EDITOR'S NOTE

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No. 84-1503-CFX
Status: GRANTED

Docketed:
March 22, 1985

Title: Chicago Teachers Union, Local No. 1, AFT, AFL-CIO, et al., Petitioners
v.
Annie Lee Hudson, et al.

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Crlove,Charles, Erowr,Thomas P., Gold,Laurence

Counsel for respondent: Vieira Jr.,Edwin

Entry	Date	Note	Proceedings and Orders
1	Jan 11 1985		Application for extension of time to file petition and order granting same until March 23, 1985 (Stevens, January 14, 1985).
2	Mar 22 1985	G	Petition for writ of certiorari filed.
3	Mar 22 1985		Appendix of petitioner Chicago Teachers Union, et al. filed.
5	Apr 10 1985		DISTRIBUTED. April 26, 1985
7	Apr 22 1985	P	Response requested. (Due May 22, 1985 - NONE RECEIVED)
8	Apr 24 1985		REDISTRIBUTED. May 9, 1985
9	Apr 23 1985	X	Brief of respondents Annie Lee Hudson, et al. in opposition filed.
10	May 2 1985	X	Reply brief of petitioners Chicago Teachers Union, et al. filed.
12	May 10 1985		REDISTRIBUTED. May 16, 1985
14	May 17 1985		REDISTRIBUTED. May 23, 1985
16	May 24 1985		REDISTRIBUTED. May 30, 1985
18	May 31 1985		REDISTRIBUTED. June 6, 1985
19	Jun 10 1985		Petition GRANTED.
			**********
20	Jul 15 1985	G	Motion of petitioners to disperse with printing the joint appendix filed.
22	Jul 10 1985		Order extending time to file brief of petitioner on the merits until August 23, 1985.
23	Aug 23 1985		Brief amicus curiae of National Education Association filed.
24	Sep 6 1985		Record filed.
25	Aug 23 1985	G	Motion of Chicago Teachers Union, Local No. 1 and Board of Education of City of Chicago for leave to file a joint brief filed.
26	Sep 18 1985		Motion of petitioners to disperse with printing the joint appendix GRANTED.
27	Sep 23 1985		Brief of respondents Annie Lee Hudson, et al. filed.
28	Sep 19 1985		Brief amicus curiae of William Cumere filed.
29	Sep 23 1985		Brief of petitioners Chicago Teachers Union, et al. filed.
30	Oct 7 1985		Motion of Chicago Teachers Union, Local No. 1 and Board of GRANTED.
31	Oct 17 1985		CIRCULATED.
32	Oct 22 1985		SET FOR ARGUMENT Monday, December 2, 1985. (1st case).
33	Nov 19 1985		Record filed.
34	Nov 19 1985		Certified copy of briefs received.

No. 84-1503-CFX

Entry	Date	Note	Proceedings and Orders
35	Nov 25 1985	X	Reply brief of petitioners Chicago Teachers Union, et al. filed.
36	Dec 2 1985		ARGUED.

(1)

84-1503

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, AND ROBERT M. HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, AND GLENDIS HAMBRICK, INDIVIDUALLY AND AS OFFICERS OF THE CHICAGO TEACHERS UNION,

Petitioners,

v.

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHERLENE HOLMES, EDNA ROSE MCCOY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, AND BEVERLY F. UNDERWOOD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated: January 23, 1985

26 pp

QUESTIONS PRESENTED

The court below held that a public employee who is represented by an exclusive bargaining representative and who objects to providing financial support to that representative is deprived of liberty without due process where an employer, acting pursuant to state law, deducts from the individual's pay an amount equal to the proportion of union dues that the union has determined it expends on collective bargaining and contract administration and where the union places that money in escrow pending an arbitrator's or state court's review of the union's determination. The questions presented by this decision are:

1. Is the court of appeals' holding contrary to this court's summary decisions in *Jibson v. White Cloud Education Association,* U.S. , 105 S.Ct. 236 (1984) and *Kempner v. Local 2077,* U.S. 105 S.Ct. 316 (1984), both of which issued after the decision below?

2. Is the court of appeals' definition of the liberty interest of objecting agency fee payers and that court's delineation of the procedural requirements imposed by the Constitution on states that permit agency shop agreements contrary to this Court's opinions interpreting the Due Process Clause and, in particular, its opinions in the line of cases from *Railway Employees Department v. Hanson,* 351 U.S. 225 (1956) to *Ellis v. Railway Clerks,* U.S. , 104 S.Ct. 1883 (1984)?

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The Chicago Teachers Union, Local No. 1, AFT, AFL-CIO, and Robert M. Healey, Jacqueline B. Vaughn, Rochelle D. Hart, Thomas H. Reece, and Glendis Hambrick hereby petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in

Hudson, et al v. Chicago Teachers Union, Local No. 1, et al., 743 F.2d 1187 (7th Cir. No. 83-3118; September 6, 1984).

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported at 573 F.Supp. 1505 and is reprinted at pages A-24-57 in a separately bound Appendix to this Petition (hereinafter "App."). The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 743 F.2d 1187 and is reprinted at App. A-1-21.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 6, 1984. App. A-22. A timely petition for rehearing *en banc* was denied on October 24, 1984. App. A-23. On January 14, 1985, Justice Stevens signed an order extending the time for filing a petition for writ of certiorari to and including March 23, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Illinois Revised Statutes, ch. 122, § 10-22.40(a) (1983) provides:

> Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization.

STATEMENT OF THE CASE

Statement of Facts

Petitioner Chicago Teachers Union Local No. 1 ("CTU") serves as the exclusive representative for a bargaining unit of 27,500 employees comprised of teachers and of other educational workers employed by the Board of Education of the City of Chicago ("the Board"). App. A-1, -26.

During the period 1967 through November 1982, every employee in the bargaining unit received all the benefits of the collective bargaining agreement which CTU negotiated with, and enforced against, the Board, but not every such employee elected to join CTU or to finance its activities on behalf of the employee group. App. A-25-26. Effective August 1, 1981, the Illinois legislature enacted a statute providing (at all times relevant here) that a collective bargaining agreement covering public school employees may contain "a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required by members"; these "proportionate share payments shall be deducted by the Board from the earnings of the non-member employees and paid to the representative organization." Ill. Rev. Stat. ch. 122, § 10-22.40a(1983). App. A-26-27.[1]

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[1] Effective July 1, 1984, the Illinois statute quoted in text was superceded by the Illinois Education Labor Relations Act, Ill. Stat. Ann. ch. 48, § 1701, *et seq.* (Smith-Hurd 1984 Supp.). That law authorizes the deduction from non-members' earnings of a "fair share fee for services rendered . . . not to exceed the dues uniformly required of members" and "not [to] include any fees for contributions related to the election or support of any candidate for political office." *Id.*, § 1711. Under that provision, the "exclusive representative shall certify to the employer . . . each non-member's fair share fee" and that fee "shall be deducted by the employer from the earnings of the non-member employees and paid to the exclusive representative." *Id.*

Pursuant to this statutory authority, in the collective bargaining agreement that became effective September 1, 1982, CTU and the Board agreed to a provision, paralleling the Illinois law, for the deduction of "proportionate share payments" from the earnings of bargaining unit employees who are not members of CTU. App. A-27.[2]

Following the negotiation of the contract, CTU reviewed its account ledgers and other records for the immediately prior fiscal year to determine what proportion of its income had been expended for purposes chargeable to nonmembers under the statute. Subtracting expenditures for benefits conditioned upon membership and expenditures for political,[3] ideological, charitable and philanthropic causes not related to bargaining, CTU determined that 4.6% of its income in the prior year had been expended on matters not germane to collective bargaining. To provide a margin for mathematical miscalculation or oversights, CTU decided to provide an advance reduction in union dues of 5% for non-members, yielding a monthly charge of $16.48 for non-member teachers, and $11.54 for non-members employed in the bargaining unit in other capacities. App. A-29. CTU's president submitted a sworn affidavit to the School Board reporting on the calculations CTU had made and requesting the School Board to commence deducting proportionate share payments from non-members' earnings, *Id.* In December, 1982, the Board began to do so. App. A-30.

Before the first deductions actually were made, CTU established an appeals procedure to adjudicate objections non-

[2] A "proportionate share payment" is referred to in other jurisdictions as a "fair share fee," a "service fee" or an "agency shop fee". We use the term "proportionate share payment" in this petition because that is the term contained in the Illinois law.

[3] In 1981-82 the CTU had established a separate CTU-PAC, funded by voluntary contributions, from which political contributions were thereafter made. R. 58: Tr. 63, 100-102. Thus the only political expenditures from the general fund were such incidental costs as clerical wages for preparing mailings, postage, and phone banks.

members might raise "concerning the existence and/or propriety of expenditures included in the proportionate share payments." App. A-28. That appeals procedure begins with an internal union review and culminates in a decision by an impartial arbitrator, accredited by a national arbitration organization and appointed by the CTU president from a list maintained by the Illinois State Board of Education pursuant to Ill. Rev. Stat. ch. 122, §§ 24-12 and 34-15 (1983) for adjudication of tenured teacher dismissals. In addition, the Illinois courts under their general "jurisdiction to adjudicate all controversies," *Lupin v. Cullerton*, 46 Ill. App.3d 387, 361 N.E.2d 6 (1977), *see also Roth v. Yackley*, 77 Ill.2d 423, 396 N.E.2d 520 (1979), were open to any non-member who believed that he/she was being charged for expenses that are not part of the cost of "the collective bargaining process and contract administration," in violation of the statute.[4]

The seven respondents in this case were at all times relevant here employed in the bargaining unit represented by CTU and were not members of CTU. App. A-30. In November, 1982—before deductions had been made from any non-member's earnings—two of the respondents wrote identically worded letters to CTU claiming a constitutional and statutory right to be free from paying any money to the Union other than an amount equal to the pro rata amount of expenditures germane to collective bargaining, contract administration, and grievance adjustment. App. A-30-31. In December, 1982, after deductions began, a third respondent sent an identical letter to CTU. *Id.*[5]

[4] Whether the Illinois state court, as a matter of state law, would have required exhaustion of the union remedies before adjudicating an objector's claim is uncertain, as no objector sued in state court.

[5] In January, 1983, a fourth respondent wrote to CTU objecting to the deduction of any money and requesting the return of all sums that had been deducted. CTU responded to this letter in the same manner as it responded to the other letters described in text. App. A-31.

None of the remaining three respondents notified CTU that he/she objected to the proportionate share payments. App. A-30. The district

The Union responded to these letters with a form letter explaining the legal basis for proportionate share fees and the manner in which the fees had been calculated by CTU, and describing the internal appeals procedure CTU had established; the letter stated that "[a]ny objection you may file will be recognized and processed in full compliance with the prescribed procedures . . ." App. A-31.

None of the respondents submitted an objection or otherwise pursued CTU's internal procedure in response to the Union's letter, nor did any respondents sue in state court to challenge the amount of the deduction under the Illinois law.[6] Instead, in March 1983, respondents commenced this action in federal court against the Board and CTU alleging that the deduction by the Board of fair share payments in the amount of 95% of union dues deprived respondents of freedom of expression and association and of due process of law. Prior to argument before the court of appeals, CTU voluntarily determined to place the entire proportionate share fees of those who had perfected an objection in an interest-bearing escrow account to be held in that account until a determination is made as to the appropriate amount of the payment to which the union is entitled. App. A-14.

Proceedings Below

In the district court, respondents challenged both the procedures that had been followed to determine the amount of the

court concluded that these three respondents—and the two respondents who had "objected" to the fee before the amount was set—were not entitled to any relief as they had not protested the fee to CTU. App. A-33. The court of appeals did not treat with that ruling.

[6] Respondent Hudson did write a second letter to CTU requesting "a full disclosure of the union's financial operations and a step-by-step explanation of how the non-member portion of the dues was gotten." CTU responded to this letter by inviting Hudson to come to CTU's offices for an "informational conference" and/or to inspect CTU's records. Hudson did neither. App. 32.

proportionate share payment and also the substance of that determination, *i.e.* the amount of the deduction. App. A-25, -35, -36, -41. The district court found the statute constitutional on its face and as applied. App. A-56. On appeal, respondents elected to "make almost their whole attack on the procedure for determining how much shall be deducted." App. A-3. Thus, as the appellate court stated, the question that was posed by respondents was whether they

> have a federal right to challenge a procedure that may not have resulted in any improper expenditures—whether, in other words, even if the union has not used any of the money it has collected from objecting employees to promote political activities unrelated to its role in collective bargaining, the plaintiffs can still complain that they have been deprived of the liberty secured them by the Constitution. [App. A-4-5.]

The appellate court answered that question in the affirmative, holding the "procedure that the defendants adopted in this case is constitutionally inadequate, and they must go back to the drawing board." App. A-12. That court ruled that it is not constitutionally sufficient for the union, before assessing proportionate share payments, to make an advance reduction of dues based upon its calculation of the portion of its income expended on matters not related to collective bargaining and to place an objector's fee in escrow. App. A-12-15. Rather, the court of appeals held that a public employer may only deduct proportionate share payments if it "establish[es] a procedure that will make reasonably sure that the wages of non-union employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining." App. A-9. Specifically that court mandated the following:

> Without wanting to be dogmatic or to foreclose consideration of alternative procedures, we suggest that the constitutional minimum would be fair notice, a prompt administrative hearing before the Board of Education or some

> other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision. [App. A-12-13.]

And the court of appeals emphasized that the burden was on "the Board, pursuant to our decision, [to] create[] such procedures." App. A-6, 9.

REASONS FOR GRANTING THE WRIT

The decision below is flatly contrary to two summary decisions of this Court—both within this very Term—each of which sustained the constitutionality of procedures for effecting proportionate share payments which procedures were less exacting than those the appellate court here held to be unconstitutional. *Jibson v. White Cloud Education Ass'n,* U.S. , 105 S.Ct. 236 (1984); *Kempner v. Dearborn Local 2077,* U.S. , 105 S.Ct. 316 (1984). This Court's decisions in *Jibson* and in *Kempner* did not issue until after the opinion below issued; petitioners attempted to call those decisions to the lower court's attention in a motion for reconsideration of the denial of rehearing, but the court below refused to allow that motion to be filed. See p. 14, *infra*. By so doing, that court allowed its decision to stand notwithstanding the conflict between its decision on the one hand and *Jibson* and *Kempner* on the other and without even confronting that conflict. The decision below thus should be vacated as inconsistent with *Jibson* and *Kempner* and with the decisions of this Court on which those summary decisions rest.

Alternatively, the decision below should be subjected to plenary review because of the conflict with this Court's decisions just noted and because the lower court ignored the fundamental lessons both of this Court's agency-shop cases from *Railway Employees Dep't v. Hanson,* 351 U.S. 225 (1965)

through *Ellis v. BRAC,* U.S. , 104 S.Ct. 1883 (1984) and also its due process jurisprudence as stated in *Matthews v. Eldridge,* 424 U.S. 319 (1976) and its progeny. This Court has recognized that "important government interests" are advanced by providing that public employees who obtain the benefits of union representation pay their proportionate share of the costs of representation, as such a requirement "promote[s] peaceful labor relations," *Abood v. Detroit Board of Education,* 431 U.S. 209, 225, 219 (1977), and that those governmental interests justify the resulting impact on First Amendment interests of objecting fee-payers. Yet the court below held that the very collection of the fee implicated plantiffs' First Amendment "liberty" of association and read the Due Process Clause as a rigid straight jacket that imposes on the states the burdensome, time-consuming and expensive obligations of establishing administrative procedures as a condition of enforcing a proportionate-share requirement.

I. THE DECISION BELOW IS DIRECTLY CONTRARY TO TWO RECENT SUMMARY DECISIONS BY THIS COURT

The precise issue that the objecting fee payers tendered to the court below has been raised in this Court twice this Term. In each instance this Court disposed of the issue summarily and in a manner contrary to the position respondents espoused below. The Seventh Circuit's decision sustaining respondents' position thus is directly contrary to two decisions of this Court, each of which issued after the decision below.[7] That decision therefore should be vacated and remanded for reconsideration in light of the Court's recent decisions.

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[7] Summary decisions by this Court are, of course, adjudications on the merits binding on the lower court. *E.g., Mandel* v. *Bradley,* 432 U.S. 173, 176 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 344-345 (1975).

1. In *Jibson v. White Cloud Education Association*, this Court dismissed, for want of a substantial federal question, an appeal from the decision of the Michigan Court of Appeals in *White Cloud Education Association v. Board of Education*, 101 Mich. App. 309, 300 N.W. 2d 551 (1980). That case was brought by a union to secure enforcement of an agency-shop clause. The employee who refused to pay the proportionate share fee required by the clause intervened in the case, arguing that he could not constitutionally be compelled to pay any money to the union until after there had been a judicial determination "of the amount . . . not used for ideological activities." 101 Mich. App. at 318, 300 N.W. 2d at 554. The Michigan court of appeals rejected that argument holding that

> the employee's First Amendment rights can be adequately safeguarded *if the disputed fee is paid to the union and the employee immediately files suit for declaratory judgment*. . . . In this manner, while the employee can quickly move for a resolution of the issue and a vindication of his constitutional rights, the union is not cripped by non-access to that portion of the fee which will be used for collective bargaining, contract administration, and grievance adjustment. [101 Mich. App. at 319, 300 N.W.2d at 555 (emphasis added).]

The employee appealed to this Court, and in his jurisdictional statement raised a single question:

> Is a State's public-sector agency-shop statute repugnant to the First Amendment's ban on laws coercing political and ideological conformity where the statute, as applied by the State's courts licenses the unions—prior to any adjudication of the amount of a constitutionally permissible agency-shop fee—to spend a dissenting employee's compulsory fee for political and ideological purposes unrelated to collective bargaining.

On October 9, 1984, this Court dismissed Jibson's appeal for want of a substantial federal question.

2. In *Kempner v. Dearborn Local 2077*, the identical issue was resolved by this Court in the identical manner. That case began as a proceeding before the Michigan Employment Relations Commission brought on behalf of an employee who objected to paying a proportionate share fee even though, in assessing that fee, the union had reduced its dues by the percentage of its income that the union had determined it expended on political and ideological purposes unrelated to collective bargaining. As in *Jibson*, the employee argued that she could not be required to pay any fee to the union prior to an adjudication of the proper amount of the fee and proposed, instead, that she pay the fee into escrow, thereby denying the union any part of the fee *pendente lite*. The Commission rejected that argument, holding that once the union made a reduction of dues for non-members based on "a good faith application of current case law," the objecting employee "must commence paying [the] reduced fee" while "pursu[ing] other remedies to obtain a final allocation of the fee." The Michigan Court of Appeals affirmed, *Kempner v. Local 2077, AFL-CIO*, 126 Mich. App. 452, 337 N.W. 2d 354 (1983), stating:

> We hold that an escrow remedy unduly restricts "the union's ability to require every employee to contribute to the cost of collective bargaining activities" . . . for, although [the employee] would part with her money, the union would not receive it. The union would nevertheless be obligated to fulfill its ongoing statutory responsibilities to the entire bargaining unit—including the charging party-appellant —without corresponding financial sustenance. [126 Mich. App. at 460-461, 337 N.W. 2d at 358.]

Kempner appealed to this Court, presenting as the first question presented in the jurisdictional statement the following:

> Is a State's public-sector agency shop statute repugnant to the First Amendment's ban on laws coercing political and ideological conformity where the statute, as applied by the State's administrative agencies and courts, licenses the

union—prior to a governmental adjudication of the amount of a constitutionally permissible agency shop fee—to either (a) spend an objecting employee's compulsory fee for political, ideological and other non-collective bargaining purposes, or (b) secure the discharge of an objecting employee for failing to pay, except into escrow, the disputed fee amount?

On October 29, 1984, this Court dismissed that appeal for lack of a substantial federal question.

3. *Jibson* and *Kempner* necessarily establish that the Constitution permits a state to provide that an objecting employee is to pay a proportionate share fee to the union *before* the amount of the fee is adjudicated by a court or governmental agency so long as the fee does not exceed the amount of union dues reduced by the percentage that the union determines, in good faith, is expended on political and ideological activities unrelated to collective bargaining,[8] and so long as a judicial or an administrative procedure exists for *post*-payment review of the union's determination of the proper reduction.[9] Under

[8] The state court decision in *Kempner* expressly notes that the union was seeking a reduced service fee. 126 Mich. App. at 456. Although the decision in *Jibson* does not so state, this Court was advised before dismissing the appeal that, in fact, the union had made an "advance reduction" of union dues in that case. *See* Appellee's Motion to Dismiss at 6. *See also* Appellant's Br. in Opp. at 3. Thus we understand *Jibson*, like *Kempner*, to permit such a reduction calculated by the union itself. ("In making this computation, the Union must use its own definition of ideological and political as long as that definition is a good faith application of current case law." *Kempner*, 126 Mich. App. at 456.) *See also Ellis v. BRAC*, 104 S.Ct. at 1890 ("advanced reduction and/or interest-bearing escrow accounts" are "acceptable alternatives" to a pure rebate approach, the latter held to violate the Railway Labor Act).

[9] In *Kempner*, the Michigan court held that "an 'objecting nonmember must . . . exhaust the internal appeal procedures provided by [the union] for challenging its allocation of the fee before requesting allocation from the Commission," 126 Mich. App. at 452, 337 N.W. 2d at 359. The constitutionality of this exhaustion requirement

Jibson and *Kempner*, so long as judicial review is available, a state is *not* required to establish an administrative process for determining the proper amount of the fee nor is the state required to make an adjudication before the union is permitted to expend any of the monies collected from an objecting employee.

Nonetheless, the decision below imposes one or both of these requirements upon the CTU and the Chicago School Board; under that decision it is not sufficient that CTU has reduced the proportionate share fee by the percentage of its expenditures (5%) that the Union determined was not expended on the collective bargaining process and contract administration,[10] and it is not even sufficient that all of the (reduced) fee remains in an interest-bearing escrow account pending arbitral or judicial review of the amount of the reduction. Thus, the decision below is in square conflict with *Jibson* and *Kempner*.

That very conflict was acknowledged by the appellant in *Kempner*. In seeking to have this Court note jurisdiction in that

was raised as the second question presented in appellant's jurisdictional statement in *Kempner*; thus, in dismissing that appeal for want of a substantial federal question, this Court necessarily upheld such an exhaustion requirement.

The decision below in the instant case is inconsistent with this aspect of *Kempner* also, for the court below concluded that "an internal union remedy and an arbitration procedure is unlikely to satisfy constitutional requirements." App. A-13. We do not pursue this conflict here because it is of no practical importance in this case: as previously explained, an employee who objects to the amount of the service fee deducted by the Chicago School Board has the option of proceeding directly to state court; if the employee does so, the disputed service fee will remain in escrow *pendente lite*.

[10] The district court below found that "CTU made a thorough analysis of its financial records in good faith compliance with both the statute and its agreement with the Board," with the result that "non-members were required to contribute only a carefully precalculated portion of union dues." App. A-51. Compare the standard in *Kempner*, quoted *supra* in note 8.

case, appellant urged that "[t]he *Hudson* decision [*i.e.*, the decision in the instant case] is particularly important" because "*Hudson* . . . delineates the multiple errors of the Michigan Court of Appeals." Br. In Opp. to Motion to Dismiss at 1, 10. This Court nonetheless dismissed the *Kempner* appeal, thereby endorsing the view of the Michigan court of appeals and not the view of the appellate court in this case.

4. The court below did not have the benefit of *Jibson* and *Kempner* on the date, September 6, 1984, that court rendered its decision. When rehearing was denied, on October 24, 1984, *Kempner* had not yet been decided and *Jibson*, which had been decided less than two weeks earlier, had not yet been called to the attention of the lower court, and was not mentioned in the order denying rehearing.[11]

Immediately after *Kempner* was decided, petitioners requested leave to file a motion for reconsideration of the denial of rehearing; the motion petitioners sought to file was predicated entirely on *Jibson* and *Kempner*. The request for leave to file was denied, thereby precluding any action on the merits of the proposed motion for reconsideration. The court below thus has not confronted the conflict between its decision and this Court's decisions in *Jibson* and *Kempner*. Accordingly, we respectfully suggest that the judgment below be vacated and remanded for reconsideration in light of *Jibson* and *Kempner*.

II. THE DECISION BELOW ERRONEOUSLY CREATES AN ENTIRELY NEW "LIBERTY INTEREST" AND IMPOSES RIGID AND UNWORKABLE PROCEDURAL REQUIREMENTS ON SCHOOL BOARDS.

If this Court were to decide that a remand of this case to the Seventh Circuit for reconsideration is not appropriate, the

[11] Petitioners sent a letter to the Seventh Circuit calling *Jibson* to the court's attention; that letter crossed in the mail with the order denying rehearing.

decision below would warrant plenary consideration. The lower court's decision not only conflicts with this Court's summary decisions in *Jibson* and *Kempner* but also rests on a reading of the First and Fourteenth Amendments that is inconsistent with this Court's precedents and that imposes burdensome, unworkable and unnecessary requirements on school boards and other public employers.

1. The first error of the court below was in finding an expansive—indeed unprecedented—liberty interest. That court believed this Court has "had no occasion to decide whether an agency fee exacted by a public employer deprives the employee of his liberty of association and therefore may not be exacted unless the dissenter is given due process of law." App. A-8. The lower Court proceeded to answer that supposedly open question in the affirmative stating that "forcing a public employee to support a union . . . does deprive him of 'liberty' within the meaning of the Fourteenth Amendment," App. A-6, and explaining that "[t]he liberty in question is freedom of association," App. A-7. According to the court of appeals "even the use of agency fees for contract negotiation and administration is an interference with First Amendment liberty" and "[s]*uch interference is a deprivation of liberty*." App. A-8. Finally, the court below added: "Contrary intimations in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 236-38 (1956) are no longer authoritative." *Id.* The court below is wrong in all respects.

Hanson, *Abood* and *Ellis* all address the very issue the lower court thought to be open and resolve that question in a manner contrary to the decision below. Those cases uniformly hold that the compelling governmental interest in promoting labor peace and eliminating "free riders" justifies any arguable impact on First Amendment interests that may result from providing that employees who do not choose to be union members are to pay agency fees to their exclusive representative to finance their share of the cost of collective bargaining and administering the

agreement. In *Hanson* the Court stated the point this way: "We only hold that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work . . . does not violate either the First or Fifth Amendments." 351 U.S. at 238. In *Abood* the Court reaffirmed that rule:

> To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. . . . But the judgment clearly made in *Hanson and* [*Machinists v.*] *Street* [367 U.S. 740 (1961)] is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. [431 U.S. at 222].

And just last Term, in *Ellis*, the Court stated:

> "To be required to help finance the union as a collective bargaining agent might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." It has long been settled that such interferences with First Amendment rights is justified by the governmental interest in industrial peace. At a minimum, the union may constitutionally "expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining." [*Ellis*, 104 S.Ct. at 1896; citations omitted].[12]

These precedents—as well as the decisions in *Street* and *Railway Clerks v. Allen*, 373 U.S. 113 (1963), which interpreted the Railway Labor Act in the light of the First and Fifth Amendments—leave no room for any suggestion that requiring all employees in a bargaining unit to provide financial support for

[12] Significantly, in support of the statement that "[i]t has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace," the *Ellis* Court cited *Hanson* and, indeed, cited the very page of *Hanson* which the court below stated was "no longer authoritative."

such activities as "contract negotiation and administration" constitutes a deprivation of liberty. Rather, those decisions teach that no deprivation of associational freedom occurs unless an objector's fee is in fact expended for activities not "germane to collective bargaining" and "involv[ing] the expression of ideas." *Ellis*, 104 S.Ct. at 1896.

The lower court's discussion of the liberty interest issue thus reduces to the proposition that the "liberty" protected by the Due Process Clause is *broader* than the First Amendment freedom of association. This Court has made it plain that the objector's interest in not being required to support any union activities is outweighed by countervailing state interests so that the objector does not have a constitutional right to refuse to support union activities germane to bargaining. Nonetheless, according to the court below, the objector's "liberty" somehow encompasses the associational interest which this Court has held does not rise to the level of a constitutional right.

The court of appeals' rationale collapses of its own weight. As this Court has stated, if an objector's money is used by the union only for permissible purposes, the objector "would have no grievance at all." *Street*, 367 U.S. at 771. Thus, insofar as the decision below rests on its expansive interpretation of the objector's "liberty" under the Due Process Clause, the decision is erroneous and, indeed, contrary to the precedents in this Court.

2.(a) The decision below is also inconsistent with this Court's cases which address the procedural requirements of the Due Process Clause. The Court has held that " '[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' " *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). This Court's decisions illustrate the application of this principle in a variety of different contexts.

See, e.g., Matthews v. Eldridge, (termination of disability benefits); *Ingraham v. Wright*, 430 U.S. 651 (1977) (infliction of corporal punishment); *Mackey v. Montrym*, 443 U.S. 1 (1979) (suspension of drivers license). The decision below completely ignores that fundamental truth.

Under that decision, each and every public employer in Illinois and Wisconsin that agrees to an agency shop provision must, before the employer may deduct proportionate share payments from its employees, assure that an objecting employee has both "a prompt administrative hearing . . . to incorporate the usual safeguards for evidentiary hearings before administrative agencies" and "judicial review of the agency's decision." App. A-13.[13] It is not sufficient, under the decision below, that the state has provided such employees *a right to proceed directly to state court* to raise their objections to the amount of the proportionate share payment before their payments are released to the union for its use: an *administrative* system is apparently required—and thereafter a right to judicial review—before the union has access to at least objectors' fees.

We know of no principle nor any precedent to support this onerous and peculiar requirement. The interest of objectors that this Court has identified as qualifying for constitutional protection is the interest in avoiding "compulsory subsidization,"

[13] Wisconsin, like Illinois, has enacted a statute authorizing local governments to deduct proportionate share payments from the earnings of employees who are represented by but do not belong to an exclusive representative. *See Wis. Stat.* § 111.70(1)(h) (1981-82). The Third state in the Seventh Circuit, Indiana, does not have a similar statute; while school districts in the state have been held to have the inherent authority to include a provision for proportionate share payments in a collective bargaining agreement, it is unclear whether such payments may be deducted from an objector's pay or must be collected only through a union lawsuit against the objector. *See Fort Wayne Education Association v. Goetz*, 443 N.E.2d 364 (Ind. App. 1983).

Abood, 431 U.S. at 237, of at least certain union activities. But such subsidization occurs only when a proportionate share payment is made available to the union for its use, and under Illinois law and CTU's procedures for implementing the proportionate share provision a judicial hearing is available *before* money is released from escrow to the union treasury. Thus, there can be no constitutional objection to the *timing* of the hearing that was available to respondents here.

We cannot conceive of any constitutional infirmity in the fact that the hearing could have been before a state-court judge *ab initio*.[14] It is, after all, the very essence of the judicial function—for state judges no less than for federal judges—to provide fair and impartial hearings that comport with the requirements of due process. Each of this Court's union-shop and agency-shop cases from *Hanson* to *Ellis* was prompted by an objector's complaint in court. Yet the very point of the holding below is that the grant of the opportunity for hearings before state judges is constitutionally insufficient and that Illinois erred in failing to provide an administrative hearing prior to the judicial hearings available under Illinois law. That holding makes no sense. And under it each year, for each proportionate share agreement, objectors will have a right to an initial administrative determination, to be followed by a judicial determination of the amount of the proportionate share payment to which each union is entitled. The administrative process thus mandated will be expensive and time-consuming to operate, and will add nothing to the judicial procedures that already are available to objecting fee payers as a matter of state law.

(b) The problem caused by the court of appeals' approach is exacerbated where the initial administrative determination required by its decision is made by a public employer with

[14] Whether an Illinois state court would have required exhaustion—as did the district court below and the state court in *Kempner*—is uncertain, as no objector used that forum.

respect to the proportionate share payments due to the union which represents that employer's employees—which is precisely what the decision-below contemplates happening in Chicago. By its very nature, collective bargaining and contract administration creates, at least in part, an adversarial relationship: "The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest.' " *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 394 (1982). Nonetheless, under the appellate court's decision, the public employer, one of the participants in the adversarial process, is to be placed in the position of judge vis-a-vis the union, from time to time its adversary. The employer is indeed commissioned to resolve which of the union's expenditures are properly chargeable to fee payers as part of the union's cost of "collective bargaining" and "contract administration" and which are not—a task to which the employer brings no particular expertise but considerable self-interest.[15]

The danger to constructive labor relations posed by placing the employer in position of judge is self-evident. And there is no need to do so, since the ultimate decision as to the proper amount of the proportionate share payment will still be made by the state court in reviewing the administrative determination.

(c) Even if, contrary to what we have just shown, the procedural requirements that the decision below mandates were not so burdensome and unnecessary, that decision would still be plainly erroneous. For, it is most explicitly *not* the task of the federal judiciary, in adjudicating constitutional challenges

[15] The district court recognized the conflict that would create, stating, "For any employer—public or private—to be placed in a position of exercising a veto over a union's allocations and expenditures would create a serious imbalance in bargaining power." App. A-53, n. 19.

to a hearing procedure established by a State, to assess the wisdom or or lack thereof of a particular state-created procedure or to determine what procedural mechanism is, in the court's view, the ideal. Rather, the only legitimate inquiry for the federal courts in such case is whether the procedure the State has established offends the "flexible" requirements of the Due Process Clause, *see Matthew v. Eldridge, supra;* only when that is true are the federal courts empowered to invalidate the State's procedures. And even if, *arguendo*, the mixed administrative-judicial process the court of appeals has mandated here were somehow superior to the judicial process available in Illinois to objecting fee payers, the fact remains that the Illinois process satisfies every conceivable requirement of the Due Process Clause. Accordingly, the court of appeals erred in holding the existing system unconstitutional and in mandating an administrative hearing system as a precondition to collecting proportionate share payments.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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84-1503

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, AND ROBERT M. HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, AND GLENDIS HAMBRICK, INDIVIDUALLY AND AS OFFICERS OF THE CHICAGO TEACHERS UNION,

Petitioners,

v.

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHERLENE HOLMES, EDNA ROSE MCCOY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, AND BEVERLY F. UNDERWOOD,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated: January 23, 1985

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-3118

ANNIE LEE HUDSON, et al.,

Plaintiffs-Appellants,

v.

THE CHICAGO TEACHERS UNION LOCAL NO. 1, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 2619—Nicholas J. Bua, *Judge.*

ARGUED MAY 31, 1984—DECIDED SEPTEMBER 6, 1984

Before POSNER and FLAUM, *Circuit Judges*, and GORDON, *Senior District Judge.**

POSNER, *Circuit Judge.* The Chicago Teachers Union has a collective bargaining contract with the city's Board of Education that makes the union the exclusive agent of teachers and certain other employees of the Board for collective bargaining. The contract contains a union-security clause which requires members of the bargaining unit who do not want to join the union to pay the union their proportionate share of the costs of the union's

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* Hon. Myron L. Gordon, of the Eastern District of Wisconsin, sitting by designation.

efforts to negotiate and administer the collective bargaining contract with the Board. The Board deducts this amount (the "agency fee") from these employees' wages, just as it deducts union dues from union members' wages. The plaintiffs, nonunion employees of the Board, brought this suit against the Board and its members and the union and its officers under section 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983 (the plaintiffs have abandoned their pendent claims), challenging the procedure established pursuant to the collective bargaining contract for determining the proportionate share that nonunion employees must contribute to the support of the union as collective bargaining agent. After a bench trial, the district judge upheld the validity of the procedure, and the plaintiffs have appealed.

After *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—like this a suit by nonunion employees of a school board against the board and the union, complaining that the union-security clause in the board's collective bargaining contract with the union violated the First Amendment as made applicable to the states by the Fourteenth Amendment—the plaintiffs cannot argue that a union-security clause violates the First Amendment even though it forces them to support financially an organization the policies and objectives of which they may disagree with, but which, disagree or not, they do not want to pay money to support. Since the collective bargaining contract makes the union the agent of all the employees in the collective bargaining unit, whether or not they are union members, every employee can be made to pay his proportionate share of the expenses that the union incurs in carrying out its responsibilities as agent; otherwise the nonunion employees would be taking a free ride on the union members' expenditures.

No more is it open to the defendants, after *Abood*, to contest the proposition that they may not, without violating the First Amendment, use money involuntarily extracted from the plaintiffs "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." 431 U.S. at 235. It is true that the union is a private entity; that the Board, in withholding an "agency fee" from its employees' wages, was acting as the union's agent; and that section 1983 only reaches action under color of state law. But when a public employer assists a union in coercing public employees to finance political activities, that is state action; and when a private entity such as a union acts in concert with a public agency to deprive people of their federal constitutional rights, it is liable under section 1983 along with the agency. See *Tower v. Glover*, 104 S. Ct. 2820, 2824-25 (1984); *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980).

The unusual feature of this case is that the plaintiffs, while objecting in passing to particular uses of the agency fee, make almost their whole attack on the procedure for determining how much shall be deducted. A threshold question therefore is whether such an attack can be based on section 1983, which so far as pertinent to this case creates a federal remedy for the deprivation, under color of state law, of liberty, without due process of law. Although this question has not been discussed extensively, an affirmative answer is implicit in our decision in *Perry v. Local Lodge 2569 of Int'l Ass'n of Machinists*, 708 F.2d 1258, 1261-62 (7th Cir. 1983), and in the Third Circuit's recent decision in *Robinson v. New Jersey*, Nos. 82-5698 et al. (3d Cir. Aug. 6, 1984), and is also supported by the Massachusetts Supreme Judicial Court's decision in *School Committee v. Greenfield Education Ass'n*, 385 Mass. 70, 78-86, 431 N.E.2d 180, 186-90 (1982).

Most cases involving a union's duty not to use agency fees to support political or ideological endeavors that are not germane to the union's responsibilities as collective bargaining agent have arisen under the federal labor-relations statutes, either the National Labor Relations Act or the Railway Labor Act, rather than the Constitution. See, e.g., *International Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961). Those statutes have been inter-

preted to require a union to represent fairly all the members of the bargaining unit for which the union is the exclusive agent, and this obligation in turn has been interpreted to include a specific duty to the unit's nonunion employees to establish procedures that will make sure that the employees are not forced to pay for union activities other than those the union undertakes in its agency role. Maybe a similar duty could be inferred from the Illinois statute (Ill. Rev. Stat. 1981, ch. 122, ¶ 10-22.40a) that authorizes agency-fee clauses in collective bargaining contracts with school boards. *Meylor v. Boys*, 101 Ill. App. 3d 148, 153, 427 N.E.2d 1023, 1026 (1981), so suggests, in part by citing *Vaca v. Sipes*, 386 U.S. 171 (1967), a leading case on the duty of fair representation under federal labor law. But the violation of a duty under state law could not be challenged under 42 U.S.C. § 1983. Nor can we force the plaintiffs to allege such a violation, although if they had (more precisely, if they had not abandoned their pendent claims), we would have the power to decide the state-law issue first in order to avoid having to decide federal constitutional issues. *Hagans v. Lavine*, 415 U.S. 528, 545-50 (1974). Pendent jurisdiction is not compulsory; and federal civil rights claimants are not required to exhaust their state remedies, *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and *a fortiori* need not give a federal judge an opportunity to adjudicate state-law claims that they might have raised but did not.

The plaintiffs also cannot base their section 1983 claim on the discussions in *Abood* and other cases of the proper remedy once improper use of revenues generated by an agency fee is proved. See 431 U.S. at 237-42. These discussions presuppose the existence of a federal right that the improper expenditures violated. See *Ellis v. Brotherhood of Railway Clerks*, 104 S. Ct. 1883, 1890 (1984). The question here is whether the plaintiffs have a federal right to challenge a procedure that may not have resulted in any improper expenditures—whether, in other words, even if the union has not used any of the money it has collected from objecting employees to promote political activities unrelated to its role in collective bargaining, the plaintiffs can still complain that they have been deprived of the liberty secured them by the Constitution.

We think they can, and on two grounds (conflated in *Robinson v. New Jersey*, *supra*, slip op. at 30-31). First, a procedure that, lacking reasonable protections for nonunion employees, makes it likely that some of the money collected from them will be used to support political objectives not germane to the union's function in the collective bargaining process infringes the First Amendment even if the procedure is not shown to have resulted in any improper expenditures. Just the danger (as distinct from actuality) of depriving people of the freedom of expression guaranteed by the First Amendment has led courts to invalidate procedures that created the danger. See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-62 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); Tribe, American Constitutional Law 724-36 (1978); Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518 (1970). This body of First Amendment law has a long historical pedigree. At common law, free speech meant freedom from prior restraints—a procedural right. The press could not be licensed although it could be punished, after the fact in a criminal proceeding, for "disseminating . . . bad sentiments." 4 Blackstone, Commentaries on the Laws of England 152 (1769); see Levy, Freedom of Speech and Press in Early American History: Legacy of Suppression 248 (1960). The present case, remote as it is from the classic prior restraint, illustrates in a new setting the close relationship between procedure and substance in free-speech cases. Since even a local union may have many members, and since most of the expenditures that a union makes are germane to its responsibilities in the collective bargaining process and thus do not violate the First Amendment even when the money expended comes in part from dissenting employees, the amount of monthly deductions potentially at issue in cases such as this is small for each such employee. As

a result, most violations of the First Amendment caused by union-security clauses or union-shop clauses (which require all employees actually to join the union) would go unremedied—maybe even undetected—if the employer had no duty to establish workable procedures for protecting dissenters' rights. We interpret the First Amendment to create such a duty. True, in the cases cited earlier the duty was to those who wanted to speak rather than to those who wanted to dissociate themselves from a speaker. But the money that an objecting employee is compelled against his will to spend to support a union's political views is money not available to him to support other political activities, and this indirect effect on the marketplace of ideas is we think sufficient to require the creation of procedures that protect against such compulsion.

The defendants owe another constitutional duty to these plaintiffs—a "due process" duty as distinct from a "free speech" duty. We have put quotation marks around these terms to acknowledge that the terms are imprecise, and require explanation. The due process clause of the Fourteenth Amendment, besides being the vehicle by which parts of the Bill of Rights, including the First Amendment, have been held to be applicable to the states, is an autonomous source of rights, including the right not to be deprived of liberty without receiving the procedural safeguards summarized by the words "due process." The standard safeguards are timely and adequate notice of the impending deprivation and a reasonable opportunity for a hearing before an impartial adjudicator. Although forcing a public employee to support a union does not take away his freedom of speech—provided his money is not used to pay for political or ideological activities that he disapproves of—it does deprive him of "liberty" within the meaning of the Fourteenth Amendment, and therefore requires the employer to give him due process of law in the sense of fair procedure, quite apart from any procedural safeguards required by the First Amendment directly.

The liberty in question is freedom of association. Although one could conceive of this freedom as extending over the whole range of private associations that are important to Americans—from the nuclear family to the social club to the political party—the cases, as we were reminded just the other day by the Supreme Court, mainly involve either the family or, as is more pertinent to the present case, associations having political or ideological goals, see *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3249-55 (1984); and in political-association cases freedom of association is an offshoot of freedom of speech. See Tribe, *supra*, at 700-10. But we need not explore in this case the outer bounds of freedom of association. Although the primary goals of American trade unions are economic rather than political or ideological, American unions have always sought to further their goals in part by appeals to public opinion. To join a union is to join an association engaged in the dissemination of ideas and opinions that may be controversial.

The particular freedom of association we are speaking of—the freedom that is ancillary to freedom of speech—has a negative as well as a positive dimension. "Freedom of association . . . plainly presupposes a freedom not to associate," *Roberts v. United States Jaycees*, *supra*, 104 S. Ct. at 3252 (citing *Abood*); see *Elrod v. Burns*, 427 U.S. 347, 357, 363-64 n. 17 (1976) (plurality opinion); *Abood v. Detroit Board of Education*, *supra*, 431 U.S. at 235; *Robinson v. New Jersey*, *supra*, slip op. at 15, which is infringed by making someone contribute money to an association engaged in political or ideological activities. True, freedom of association, whether positive or negative, is no more absolute than the other liberties that the due process clause protects against deprivation without due process of law. But the fact that it enjoys the procedural protections capsulized in the term "due process" means that the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go no further than is necessary to

prevent the individual from taking a free ride on an entity that (whether or not he wants to support it) is providing services to him as his collective bargaining representative.

The Supreme Court in *Abood* had no occasion to decide whether an agency fee exacted by a public employer on the union's behalf from a dissenting employee deprives the employee of his liberty of association and therefore may not be exacted unless the dissenter is given due process of law. But the Court did remark that "to compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," and "to be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." 431 U.S. at 222. By adding that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress," the Court made clear its view that even the use of agency fees for contract negotiation and administration is an interference with First Amendment liberty (though a lawful interference), offering as an example the union's negotiating a clause requiring the employer to reimburse employees for the expense of abortions. *Id.*; see also *id.* at 256 (concurring opinion); *Roberts v. United States Jaycees*, *supra*, 104 S. Ct. at 3255; *id.* at 3257-61 (concurring opinion). Such interference is a deprivation of liberty that is forbidden to the states and their agencies without due process of law. Contrary intimations in *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 236-38 (1956), are no longer authoritative.

The two grounds we have suggested for regarding the plaintiffs' procedural challenge as properly brought under section 1983—free speech and due process, as we have loosely called them—have different implications for the scope of protection. The first implies that the public

employer must establish a procedure that will make reasonably sure that the wages of nonunion employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining. The second implies that the procedure must make reasonably sure that those employees' wages will not be used to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological. Thus expenditures not germane to collective bargaining, but not political or ideological either, would have a different status under the first and second grounds. But since the second ground is valid, it follows that the employer's obligation is not limited to establishing a procedure for preventing the diversion of nonunion employees' wages to political or ideological activities unrelated to the union's collective bargaining responsibilities; the procedure must make reasonably sure that the agency fee is not used for any unrelated activities.

Having established the legal standard for evaluating the procedure in this case, we turn to the particulars of that procedure. Soon after the union-security clause became effective on September 1, 1982, the union calculated the percentage of its expenditures that it believed (or at least claimed) had been costs of negotiating or administering the contract during the fiscal year that ended on June 30, 1982. On the basis of this calculation it set the agency fee at 95 percent of the union dues (for teachers, those dues were $17.35 a month for 10 months of the year), and asked the Board to deduct this percentage from the wages of nonunion employees. The Board began doing so in December 1982. But it did not tell the employees how the 95 percent figure had been arrived at, or about the procedure that had been established for challenging the figure, although the union described the procedure in the December issue of the union newspaper, which was widely circulated to nonmembers. Under the procedure, an objecting nonunion member has 30 days after the agency fee is first deducted from his paycheck to file an objec-

tion with the union. The union's executive committee reviews the objection. If it rejects it, the objector has 30 days to appeal to the committee, and if he appeals in time he is entitled to a personal hearing. If his objection is turned down on the basis of that hearing, he can ask for arbitration. The union's president picks the arbitrator from a list of arbitrators accredited by the state board of education; the union pays the arbitrator's fee; and the arbitrator's decision is final. If at any stage in the proceeding the objecting employee succeeds in getting the agency fee reduced, he is entitled to a rebate of the excess that has already been deducted from his wages, as well as to a reduction in future deductions. The union must make the same reduction for all other nonmembers as well, including those who were not parties to the grievance proceeding; but apparently it is not required to give them any rebate. None of the plaintiffs followed the prescribed procedure through to the end (some did not invoke it at all), but that is unimportant if the procedure violates their constitutional rights.

The most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees. Cf. *Schneider v. Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963, 975 (D.P.R. 1983). It is not surprising therefore that some of the plaintiffs thought it futile even to ask the union to reduce the fee. Their perception was reinforced by the way in which the union handled their objections to the amount of the fee: as the district judge found, the union hindered (through inexperience, though, not malice) the efforts of several of the plaintiffs to file objections.

Although the Supreme Court in *Abood* suggested that an internal union procedure might be an appropriate method of protecting objectors' rights, see 431 U.S. at 240, it was merely repeating a suggestion that had been made in a case under the Railway Labor Act. *Brotherhood of Railway & Steamship Clerks v. Allen*, 373 U.S. 113,

122 (1963). That act, as it has been interpreted, both imposes on the union a duty to represent dissenters fairly and creates remedies for violation of that duty. Probably, as we said earlier, the Illinois act imposes the same duty. But that is not certain. Maybe under Illinois law the union has no duty to nonmembers. This possibility casts doubt on the adequacy of a grievance procedure controlled by the union.

The problem would not be so serious if there were an independent arbitrator at the end if not at the beginning of the process. But the arbitrator is picked by the union. It is true that he is picked from a list which, we are told, contains about 50 names, thus confining the union's choice somewhat. But even if the Illinois law imposes on the union the identical duty of fair representation that the union would have if it were subject to the Railway Labor Act or the National Labor Relations Act, the union's relationship to dissenting members of the bargaining unit would, as a realistic matter, contain a sufficient residue of adverseness to raise serious objections to giving the union a unilateral choice of arbitrator. "The union's interests and those of the individual employee are not always identical or even compatible." *McDonald v. City of West Branch*, 104 S. Ct. 1799, 1804 (1984); see *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981).

There are 15 federal district judges in active service in the Northern District of Illinois, all unimpeachably accredited; and yet the union would not try to defend a procedure that let it (or the dissenters!) pick the judge to preside in this case. See *United States v. Bursten*, 560 F.2d 779, 786 (7th Cir. 1977) (per curiam); *Barnes v. United States*, 241 F.2d 252, 254 (9th Cir. 1956); *United States v. Garrison*, 340 F. Supp. 952, 956 (E.D. La. 1972). "Next to the impropriety of being Judge in one's own cause, is the appointment of the Judge." 2 Records of the Federal Convention of 1787, at 82 (Farrand rev. ed. 1937) (remarks of Gouverneur Morris). The situation here is even more troublesome. The arbitrator, unlike a federal judge, is not paid a salary that is independent of the

number of cases he presides over, or of the goodwill of a litigant. The arbitrator is paid for each arbitration, and this gives him a financial interest in deciding cases favorably to the union—which hires him, and incidentally which pays him. "[N]o man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955); see also *Brown v. Vance*, 637 F.2d 272, 276 (5th Cir. 1981).

Another problem is that the arbitrator is required to decide whether union activities are political or ideological, on the one hand, or germane to the union's collective bargaining responsibilities on the other. And as these are not mutually exclusive categories he must also decide whether certain political or ideological activities are so intrinsic to the union's responsibilities as collective bargaining agent that the union should be allowed to force the dissenters to contribute to their expense. In *McDonald v. City of West Branch, supra*, the Supreme Court held that an arbitrator's determination that a public employee had been fired for cause was not entitled to collateral estoppel effect in the employee's subsequent 1983 suit for wrongful discharge, a suit based on an alleged violation of the First Amendment. This result suggests that the Supreme Court doubts the competence of arbitrators—whose area of expertise, after all, is the interpretation of contracts rather than the interpretation of the Constitution—to make First Amendment determinations. Compare 104 S. Ct. at 1803 with *Parrett v. City of Connersville*, 737 F.2d 690, 696-97 (7th Cir. 1984). But that is what the arbitrator would have to do in any case where the dissenter objected that the agency fee that he was forced to pay was being used for impermissible political or ideological purposes.

The procedure that the defendants adopted in this case is constitutionally inadequate, and they must go back to the drawing board. But it would be unhelpful of us to leave the parties and the district court without any guidance. Without wanting to be dogmatic or to foreclose consideration of alternative procedures, we suggest that the

constitutional minimum would be fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision. The combination of an internal union remedy and an arbitration procedure is unlikely to satisfy constitutional requirements given the nature of the issues to be decided and the union's stake in how they are decided.

The plaintiffs have a separate objection to the remedy that the existing procedure provides for those who invoke it successfully. The remedy is a rebate of the amount of the agency fee improperly deducted and a reduction in future deductions (the latter aspect of the remedy is not controversial). During the period between the deduction and the rebate, the union has the use of the dissenter's money, interest free. This means that even if the dissenter wins, some of his money—the amount being measured by the value to the union of having this interest-free loan—ends up supporting the union's political activities. *Ellis v. Brotherhood of Railway Clerks, supra*, 104 S. Ct. at 1890, makes clear that such a rebate procedure is inadequate even if the union pays interest on the amount deducted, for "even then the union obtains an involuntary loan for purposes to which the employee objects." True, *Ellis* was a case under the Railway Labor Act rather than under the due process clause of the Fourteenth Amendment. But the reason that the Railway Labor Act was interpreted to limit the use of agency fees was to avoid the serious constitutional questions that would have been raised otherwise. See *International Ass'n of Machinists v. Street, supra*, 367 U.S. at 749-50; *Abood v. Detroit Board of Education, supra*, 431 U.S. at 219-20. We know from *Abood*, and have tried to make clear in this opinion, that the Constitution indeed requires the same safeguards for dissenters' rights as the earlier cases found were required by the federal labor statutes. It follows that *Ellis* is as good a precedent under the due

process clause of the Fourteenth Amendment as under the Railway Labor Act. Therefore a procedure for protecting the rights of dissenters is not constitutionally adequate if it cannot make whole the dissenter who wins his case; and the rebate procedure in this case, like the one in *Ellis*, cannot.

It is true that in *Ellis* the union had made no effort to determine in advance what fraction of its dues was not pertinent to collective bargaining and therefore should not be charged to objecting nonmembers. But that is an immaterial difference, at least on the facts of this case. A union cannot just choose some level of agency fee and, if it chooses too high, have the use, interest free, of the excess that it is later ordered to refund, until it refunds it. In *Robinson v. New Jersey*, the Third Circuit found that a 15 percent advance reduction for nonmembers of the union provided a sufficient cushion to protect them. See slip op. at 33 n. 12; cf. Developments in the Law, *Public Employment*, 97 Harv. L. Rev. 1611, 1733 n. 59 (1984). Here the advance reduction was only 5 percent.

The Court in *Ellis* suggested, as an alternative to the procedure that it invalidated, placing the dissenters' money in an escrow account in a bank or trust company while the legitimacy of the union's proposed use of it is being determined. 104 S. Ct. at 1890. Then the union gets no use out of the money unless it wins its dispute with the dissenter; but since it does get the money if it wins, together with any accrued interest, it has an incentive to place the escrow fund at a high interest rate, and its rights and those of nondissenters are protected along with the dissenters' rights. The union's counsel told us at oral argument that after this case was brought the union began voluntarily placing dissenters' agency fees in escrow. This was a step in the right direction but does not make the issue moot. The union has made no commitment to continue to place such fees in escrow and has not indicated what the terms of the escrow are. The terms cannot be left entirely up to the union. The union might

decide, for example, to forgo a high interest rate in order to punish dissenters (even though it would be punishing itself at the same time). It would be best if the union turned management and not just custody of the account over to a bank or trust company. But we need not go into those details here. It is enough to hold that a proper escrow arrangement is required in order to protect the dissenters' constitutional rights.

There are two loose ends to be tied up, and we are done. First, the plaintiffs argue that the Illinois statute (cited earlier) authorizing agency fees in collective bargaining contracts negotiated with school boards is unconstitutional because it fails to set forth constitutionally adequate procedures—or indeed any procedures—for determining dissenters' objections. We do not understand this argument. When the Board, pursuant to our decision, creates such procedures, the plaintiffs will not be able to complain just because those procedures are not written into a statute. Second, the Board of Education argues that it has a good-faith immunity from suit. Although this defense was alluded to in the Board's answer to the complaint, it appears to have been abandoned in the course of the proceedings in the district court (though this is not certain); and the court did not mention the issue in its opinion. Even if the Board has immunity, this would not affect the plaintiffs' right to an injunction and attorney's fees. See *Pulliam v. Allen*, 104 S. Ct. 1970 (1984). The plaintiffs are seeking damages as well, but from the union as well as the Board, and the union is not immune. Cf. *Tower v. Glover*, *supra*, 104 S. Ct. at 2824-25. It is speculation at this stage whether the plaintiffs will attempt to get a damage judgment entered against the Board as well. Our uncertainty over whether immunity will ever be a live issue, the possibility that the issue was abandoned in the district court, and the fact that the district judge did not address it in his opinion persuade us not to deal with it either. The Board can if it wants try to renew the defense on remand; we make no prediction of its success in such an effort.

We reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion. Circuit Rule 18 shall not apply.

FLAUM, *Circuit Judge*, concurring in the result. I agree with the majority opinion only insofar as it holds that the Chicago Teachers Union (CTU) plan for arbitration and rebate of agency fees violates the constitutional rights of those employees as the plan relates to fees used to finance political and ideological expenses of the CTU. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court held that nonunion employees could not be compelled to contribute to political or ideological activities of a union. The majority in this case reaches a step further and creates a constitutional right not to be compelled to contribute to any activities that are not germane to collective bargaining, regardless of whether the activities are political or ideological. The majority further holds that the CTU plan is invalid in allowing for arbitration and rebate of those fees. I believe that we need not reach these issues.

A.

In 1981, the Illinois legislature passed a statute allowing local school boards to include in collective bargaining agreements a provision requiring nonunion employees "to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members." Ill. Rev. Stat. ch. 122 ¶ 10-22.40(a). The Chicago School Board and the CTU included such a provision in their collective bargaining agreement effective September 1, 1982. That provision states in pertinent part:

> All full-time employees covered by this Agreement who are not members of the UNION shall . . . pay to the UNION each month their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required by members of the UNION.

Agreement Between the Board of Education of the City of Chicago and the Chicago Teachers Union, Article 1, § 8.2 (hereinafter "agreement"). The CTU calculated its agency fee, and then adopted its plan for arbitration and rebate of fees by nonmembers. The plan allows nonunion members to object only to

> any expenditure of his or her proportionate share payments for political activities or causes, or for activities or causes involving ideological issues not germane to the collective bargaining process or contract administration.

Plaintiffs allege that, in calculating its agency fee, the CTU included expenses that are not related to collective bargaining and contract administration. In their complaint, plaintiffs raised several pendent claims under the Illinois Constitution and under the state statute. In the district court and on appeal, however, plaintiffs have focused on federal constitutional challenges to the agency fee scheme. They argue that the inclusion of any such expenses, regardless of whether the expenses are political or ideological in nature, violates their first and fourteenth amendment rights. They further argue that the CTU arbitration and rebate plan violates these rights.

The district court did not determine whether the inclusion of the challenged expenses was constitutional. The court held that the arbitration and rebate procedure was constitutionally adequate, and it ruled that all disputes over included expenses would have to be determined initially through that procedure.

B.

Plaintiffs have alleged that a portion of their agency fee is being used to pay for political and ideological activities of the union that are unrelated to collective bargaining and contract administration. It is clear that such an allega-

tion states a cause of action for a violation of their constitutional rights of free speech and free association. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Where nonunion members state such a cause of action, the constitution entitles them to a procedure that prevents their compulsory subsidization of the impermissible union activity without unduly restricting the union's ability to require them to pay their fair share of the cost of permissible activity. *Id.* at 237.

Both the procedure and remedy of the CTU rebate plan fail to meet this standard. The procedure relies on an arbitrator to determine whether expenses are ideological or political and thus cannot be charged to nonunion members. This involves "difficult problems in drawing lines," *id.* at 236, of constitutional origin. The Supreme Court has recently held that an arbitration award cannot be given preclusive effect in a section 1983 suit, *McDonald v. City of West Branch*, 104 S. Ct. 1799, 1804 (1984), reasoning that because of institutional limitations on the arbitration process, arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights." *Id.* at 1803. Institutional limitations include the fact that most arbitrators are not lawyers, that an arbitrator's authority extends only to enforcing the terms of the contract, and that arbitral fact-finding is not equivalent to judicial fact-finding. *Id.* at 1803-04. These same limitations also make arbitration an inadequate forum for drawing lines as to permissible expenses based on the first and fourteenth amendments. Because arbitration may not protect constitutional rights, the CTU procedure is invalid.

The remedy—a rebate of the fee improperly deducted—also is constitutionally invalid. A rebate procedure allows the union temporary use of money for activities that violate nonunion members' rights. The temporary use of funds for improper purposes injures plaintiffs in two ways: it causes them to subsidize ideas with which they disagree; and it depletes their funds available for supporting causes with which they agree. *See Seay v. McDonnell Douglas*

Corp., 427 F.2d 996, 1004 (9th Cir. 1970). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality opinion); *see New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). There are clearly less restrictive alternatives for the union. *See Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 104 S. Ct. 1883, 1890 (1984). Thus, the rebate system is improper. *See Abood v. Detroit Board of Education*, 431 U.S. at 244 (Stevens, J., concurring).

C.

The majority opinion holds that the CTU's inclusion of any expenses that are not germane to collective bargaining but that are not political or ideological in nature violates plaintiffs' fourteenth amendment "liberty of association." *See ante* at 7-9. From this, it holds that the CTU procedure is unconstitutional in that it does not ensure that the deprivation of liberty does not go further than is necessary.

No other federal appellate court has yet reached the issue of whether nonunion members have a constitutional right not to be charged for expenses that are not germane but not political or ideological. I also do not reach this issue. It is clear that both the Illinois statute and the agreement prohibit the inclusion of any expenses other than the cost of collective bargaining and contract administration. The CTU procedure allows the plaintiffs' fees to be used temporarily for purposes that violate the statute and the agreement. It is possible that by allowing this, the procedure itself may violate the statute and/or the agreement. *Cf. Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 104 S. Ct. at 1889-90 (union rebate plan violates Railway Labor Act by allowing for temporary use of fees collected in violation of Act).

It is a fundamental doctrine of federal adjudication, founded on strong prudential considerations, that a federal court should not resolve constitutional questions when an issue can be resolved on statutory or other grounds. This doctrine has been applied repeatedly where the nonconstitutional ground is a pendent state law claim. *See Hagans v. Lavine*, 415 U.S. 528, 546 (1974) ("[t]he Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims") and cases cited therein; *Schmidt v. Oakland Unified School District*, 102 S. Ct. 2612 (1982) (per curiam); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 173, 193 (1909) (doctrine of deciding state pendent claim before reaching federal constitutional issue "is not departed from without important reasons"); *cf. Hutchinson v. Proxmire*, 443 U.S. 111, 122 (1979). Moreover, the Supreme Court has repeatedly determined the validity of union security plans on statutory grounds before reaching constitutional issues. *See Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 104 S. Ct. at 1890; *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961). I find no reason to depart from the doctrine here. To say that plaintiffs here have not pressed their pendent claims as grounds for disposition of this case cannot justify a different approach. If it did, parties could in effect always force federal courts to reach constitutional issues by the simple expediency of failing to press, or even to plead in the first instance, statutory grounds.[1] It is for the courts, and not for the

[1] This approach, in my view, does not conflict with the Supreme Court's holdings in *Patsy v. Board of Regents*, 457 U.S. 496 (1982) and *Monroe v. Pape*, 365 U.S. 167 (1961), that exhaustion of state remedies is not required prior to bringing suit in federal court under 42 U.S.C. § 1983. Those cases hold that exhaustion is not a jurisdictional prerequisite to bringing suit in federal court. Nothing in those cases, or in their reasoning, requires a federal court to reach novel issues of constitutional law where an issue may be addressed on state statutory grounds.

The majority states that "[p]endent jurisdiction is not compulsory." *Ante* at 4. It is of course clear that pendent jurisdiction

(Footnote continued on following page)

parties, to determine when a decision on constitutional grounds is both necessary and appropriate.

Whether the CTU procedure violates the statute or the collective bargaining agreement are questions purely of state law. Moreover, the parties have not argued this issue either in the district court or on appeal. Thus, I deem it inappropriate to consider these issues for the first time here. I would remand to the district court for a determination of whether this issue can be resolved on statutory or contractual grounds. *See Ruslan Shipping Corp. v. Coscol Petroleum Corp.*, 635 F.2d 648, 651-52 (7th Cir. 1980). *Cf. Abood v. Detroit Board of Education*, 431 U.S. at 236 n.33 (Court ruled that it would not determine whether use of fees for "social expenses" was unconstitutional but would leave issue to state courts).

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Clerk of the United States Court of Appeals for the Seventh Circuit

[1] *continued*
is not compulsory as to the court; the district court has discretion to dismiss pendent claims. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The majority suggests, however, that pendent jurisdiction is not compulsory as to the parties. This in effect is inconsistent with this court's holding in *Harper Plastics v. Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir. 1981), that a federal court judgment on federal law issues will, as res judicata, preclude a subsequent state court suit where the state claims could have been brought as pendent claims in the federal suit. The court rejected the argument that the uncertainty that the federal court will exercise pendent jurisdiction justifies the failure to bring pendent claims. "We fail to discern the unfairness in requiring a plaintiff to join all relevant theories of relief in a single proceeding." *Id.* at 946. The federal claim in *Harper Plastics* was based on the antitrust statutes. The Ninth Circuit has applied *Harper Plastics* to bar a state court suit where the federal suit was brought in part under 42 U.S.C. § 1983. *Midkiff v. Tom*, 725 F.2d 502 (9th Cir. 1984).

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United States Court of Appeals

For the Seventh Circuit

CHICAGO, ILLINOIS 60604

September 6, 1984.

BEFORE

Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MYRON L. GORDON, Senior District Judge*

No. 83-3118

ANNIE LEE HUDSON, et al.,
Plaintiffs-Appellants,

v.

THE CHICAGO TEACHERS UNION, LOCAL NO. 1, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 83 C 2619
NICHOLAS J. BUA, *Judge*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the cause is REMANDED, in accordance with the opinion of this Court filed this date.

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*Honorable Myron L. Gordon, Senior Judge, United States District Court for the Eastern District of Wisconsin, sitting by designation.

United States Court of Appeals

For the Seventh Circuit

CHICAGO, ILLINOIS 60604

October 24, 1984

BEFORE

Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MYRON L. GORDON, Senior District Judge*

No. 83-3118
ANNIE LEE HUDSON, et al.,
Plaintiffs-Appellants,

vs.

THE CHICAGO TEACHERS UNION LOCAL NO. 1, et al.,
Defendant-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 2619
Nicholas J. Bua, *Judge*

ORDER

On October 9, 1984, defendants-appellees filed two petitions for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petitions, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petitions are therefore DENIED.

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*Hon. Myron L. Gordon, of the Eastern District of Wisconsin, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHERLENE HOLMES, EDNA ROSE McCOY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD, *Plaintiffs,* *vs.* **THE CHICAGO TEACHERS UNION, LOCAL No. 1; ROBERT M. HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, GLENDIS HAMBRICK, individually and as officers of the Chicago Teachers Union; THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, ILLINOIS; RAOUL VILLALOBOS, MARTHA JANTHO, THOMAS CORCORAN, BETTY BONOW, SOL BRANDZEL, CLARK BURRUS, LEON JACKSON, ROSE MARY JANUS, DR. WILFRED REID, MYRNA SALAZAR, DR. LUIS SALCES, VIOLA THOMAS, individually and as officers and members of the Board of Education for the City of Chicago, Illinois,** *Defendants.*	**No. 83 C 2619 Honorable Nicholas J. Bua, Presiding**

ORDER

This matter comes before the Court upon a complaint accompanied by a motion for a preliminary injunction. Plaintiffs are employees of the Board of Education of the City of Chicago (the

"Board") who are not members of the Chicago Teachers Union ("CTU"). Named as defendants are the Board, the twelve members of the Board individually and as officers and members, and the CTU.

Plaintiff's complaint is in seven counts, challenging the constitutionality of Ill. Rev. Stat. ch. 122 ¶ 10-22.40a (1981) on its face and as applied, under both the United States Constitution and the Constitution of Illinois. Plaintiffs claim violations of their civil rights under Title 42 U.S.C. §§1983 and 1988, seeking damages and invoking this Court's equitable powers under 28 U.S.C. §§1331 and 1343 for injunctive and declaratory relief. The suit is brought on behalf of plaintiffs and on behalf of all those similarly situated as employees of the Board of Education of the City of Chicago who are not members of the Chicago Teachers Union. A motion to maintain a class action and for certification of the class was filed on May 19, 1983.

The Court set May 26, 1983 for hearing on the motion for a preliminary injunction. Subsequently, the parties agreed to advance the matter for a full trial on the merits pursuant to Rule 65(a)(2) F.R.C.P. The presentation of testimony and evidence proceeded accordingly. Based upon its review of the evidence presented at trial and the parties' pretrial and post trial briefs, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT[1]

I. Background

Since 1967, the Chicago Teachers Union ("CTU") has served as the exclusive bargaining representative to the Board of Education of the City of Chicago (the "Board") on behalf of the

[1] To the extent that any of the findings of fact included herein are deemed to be conclusions of law, they are hereby adopted as

approximately 27,500 persons who are included within the bargaining unit of Board employees.[2] Membership in CTU is voluntary; all but five percent of all employees in the bargaining unit are union members. All employees, however, whether or not members of the union, are fully covered by the terms of the collective bargaining agreement between CTU and the Board. Until December, 1982, the entire cost of collective bargaining and contract administration was underwritten by CTU members through their union dues. Thus, those teachers and other employees within the bargaining unit who chose not to join CTU received the benefits of CTU's collective bargaining efforts without contributing financially to the costs of such efforts.

For several years, CTU had attempted without success to negotiate a "fair share fee" clause into its labor contracts with the Board.[3] The major obstacle was the absence of any language in the Illinois School Code, Ill. Rev. Stat. ch. 122 ¶ 1-1 *et seq.* (1981), enabling the Board to agree to such a clause. Effective August 1, 1981, the Illinois Legislature enacted a statute providing as follows:

> *Non-member proportionate share payments in lieu of dues.*
>
> Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring

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conclusions of law. To the extent that any of the conclusions of law included herein are deemed to be findings of fact, they are hereby adopted as findings of fact.

[2] The bargaining unit includes: all full-time teachers, assistant principals, truant officers, school library assistants, hearing testers, vision testers, school clerks, teachers' aides, and school community representatives employed by the Board.

[3] A "fair share fee," alternately known as a "proportionate share," "agency," or "representation" fee, requires essentially that non-union employees pay a share of the union's costs of collective bargaining.

> employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization.

(Ill. Rev. Stat. ch. 122 ¶ 10-22.40a) (1981).

Acting under the newly granted authority of ¶ 10-22.40a, the Board agreed to the inclusion of a "fair share fee" clause in the next collective bargaining agreement with CTU. The clause was contained in Article 1, Section 8.2 of the one-year collective bargaining agreement between CTU and the Board, effective September 1, 1982, which read as follows:

> 1-8.2. All full-time employees covered by this Agreement who are not members of the UNION shall, commencing sixty (60) days after their employment or the effective date of the Agreement, whichever is later, and continuing during the term of this Agreement, and so long as they remain non-members of the UNION, pay to the UNION each month their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required by members of the UNION. Such proportionate share payments shall be deducted by the BOARD from the earnings of the non-member full-time employees and paid to the UNION. The UNION shall submit to the BOARD an affidavit which specifies the amount which constitutes said proportionate share which shall not exceed the dues uniformly required of members of the UNION.
>
> The UNION shall indemnify and hold harmless the Board of Education, its members, officers, agents and employees from and against any and all claims, demands, actions, complaints, suits, or other forms of liability that shall arise out of or by reason of action taken by the BOARD for the purposes of complying with the above provisions of this

Article, or in reliance on any list, notice, certification, affidavit or assignment furnished under any of such provisions.

Shortly after CTU and the Board signed the new agreement, CTU amended its constitution and by-laws to authorize the CTU to determine the amount of the fair share fee, receive and consider objections thereto, and set up a hearing procedure for non-members who objected to deductions. Accordingly, CTU adopted a hearing and appeal procedure known as the "CTU Implementation Program." Under the procedure, any non-member could object to any expenditure by CTU of his or her fair share fee payroll deductions for activities or causes which were political or ideological and not germane to the collective bargaining process or contract administration. The objector was required to individually notify the president of CTU of his or her objection by registered mail within 30 days after the first payroll deduction. The objection would be considered by CTU's Executive Committee, and the objector would be notified within 30 days of any decision as to a reduction in the amount of the payroll deduction. The objector could appeal within another 30 days, and receive a personal hearing before the CTU Executive Board. If still unsatisfied, the objector could invoke a determination by an impartial arbitrator to be appointed by the CTU president from a list maintained by the Illinois State Board of Education of accredited arbitrators. CTU was to bear the cost of such a proceeding. A determination favorable to the objector would result in an immediate reduction in the amount of deductions for all non-union members and a rebate to the objector. Provision was also made for consolidating proceedings in the case of multiple objectors.

The CTU Implementation Program was designed to become available only after the first fair share fee deduction. Non-members were not provided any right or opportunity to challenge CTU's initial request to the Board or the basis on which the

deduction was calculated, nor were non-members given the right or opportunity to challenge the deduction prior to the time the deduction was actually made.

The CTU determined the amount of the fair share fee based on its account ledgers and other records for the year beginning July 1, 1981 and ending June 30, 1982. Calculations were made by the assistant office manager, with the assistance of counsel and the financial secretary of CTU. The CTU estimated that a total of $188,549.82 in expenditures was unrelated to the costs of collective bargaining and contract administration. Based upon its financial statements, CTU calculated its income for the year at $4,103,701.58. As a result, CTU determined that the fair share fee for the contract year 1982-83 should be 95 percent of union dues, based on the calculation that $188,549.82 divided by $4,103,701.58 equals approximately five percent.[4] Current CTU dues were at that time $17.35 per month for ten months for teachers and $12.15 per month for ten months for "career service employees."[5] Accordingly, the amount to be deducted each month for ten months would be $16.48 from non-union teachers' paychecks and $11.54 from non-union career service employees.

In October, 1982, CTU requested the Board to begin making deductions. The request was accompanied by an affidavit signed by CTU President Robert Healey, which specified the amount of the fair share fee, briefly explained how the figure had been

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[4] The precise percentage was 4.5946 percent. By rounding off this figure to 5 percent, CTU gave up approximately $16,636 in favor of non-members, which amount, it reasoned, could provide a "cushion" to cover any inadvertant mathematical or typographical errors.

[5] Union members had the option of prepaying this amount in a lump sum of $173.50 or $121.50, depending on their classification, or spreading payments over the year. Roughly 91 percent of union members chose the latter.

calculated, and stated that a hearing procedure was available to non-union members who wished to object to the deductions.

The Board did not review any of the documents or calculations used by CTU in determining the fair share fee, nor did it challenge any of the information in the affidavit. In December, 1982, the Board began deducting the fair share fee from non-member employees' paychecks. At no time did the Board ask for the consent of the non-member employees to the deductions, explain the basis for the determination of the amount deducted, or inform them of the rebate and appeal procedure set up by CTU.

CTU, for its part, asked its member delegates at all schools to distribute flyers, display posters, generally inform non-members of the pending deductions, and invite non-members to enroll in CTU, with amnesty for past imposed fines. The CTU Implementation Program was published in the December, 1982, issue of the union newspaper which was widely circulated to non-members.

II. Plaintiffs' Responses to Fair Share Fee Deductions

Each plaintiff is a member of the bargaining unit represented by CTU, but none is a member of CTU. Six of the seven plaintiffs have had fair share fee deductions made from their paychecks.[6] Of these six, it is stipulated that two never made any objection to the deductions to either the Board or the CTU.[7] It is further stipulated that all of the remaining four plaintiffs submitted letters of protest to CTU. Plantiffs Hudson, Campbell and Sherrill sent identically worded letters, stating in substance that they believed that CTU was using part of their salary for

[6] For some unknown reason, plaintiff Edna Rose McCoy has never had an agency fee deducted from her paycheck.

[7] Plaintiffs Estherlene Holmes and Dr. Debra Ann Petitan.

purposes unrelated to collective bargaining with the Board, specifically protesting and objecting to such expenditures, and demanding that payroll deductions be reduced to only the pro rata amount necessary for collective bargaining, contract administration, and greivance adjustment with the Board. The fourth plaintiff, Beverly Underwood, also wrote to CTU. Underwood's letter, however, differed from the other three identical letters. Underwood wrote that she was "objecting to the unauthorized deductions by CTU of *any* money from [her] paycheck." She requested the president of CTU to consider her objection "and return *all* payroll deductions." The letters sent by Campbell and Sherrill were sent on November 19, 1982, before the CTU implementation program had been publicized. Underwood and Hudson, did not send their letters until after the first payroll deduction had been made and after the objection-rebate procedure had been publicized.

CTU answered all four letters individually with indentical form letters which acknowledged receipt of plaintiffs' letter requesting a reduction in fees, briefly explained the process by which the fair share fee had been calculated, and concluded, "as a result, you will note that the Chicago Teachers Union has, in fact, reduced the amount of the fees to be deducted from your earnings...as you have requested in your letter." The letter stated that an appeal procedure had been established and enclosed a copy of the Implementation Plan. The CTU letter closed, "any objection you may file will be recognized and processed in full compliance" therewith.

None of the four letters sent by plaintiffs was ever submitted to the Executive Committee of CTU or otherwise reviewed pursuant to the Implementation Plan. Neither the financial secretary nor the president of CTU considered any of the four letters as amounting to the type of written objection sufficient to trigger the objection-rebate procedure. The form letter sent by

CTU was intended to make sure that all those who wrote concerning deductions would have a copy of the Implementation Plan, be apprised of their right to object, and be afforded the opportunity to do so.

Upon receiving the CTU letter, three of the protesting plaintiffs took no futher action. Sherrill took no further steps because he objected to the requirement that he submit to the objection-rebate procedure. Campbell had no further contact with CTU because she did not feel anything would come of it. Underwood testified that she believed her letter had triggered the appeal process, and consequently she did nothing more, anticipating that CTU would be contacting her to set a hearing date.

Plaintiff Hudson, however, wrote a second letter to CTU to reply to CTU's answer to her original letter. In the second letter, Hudson stated, "I would like a full disclosure of the Union's financial operations and a step-by-step explanation of how the non-member portion of the dues was gotten." CTU responded by letter to Hudson's second letter by reiterating the gist of CTU's first letter and inviting Hudson to make an apppointment at the CTU office for an "informational conference" and/or to inspect the roster of CTU expenditures. The letter concluded, "After such conference, if you continue to object to any expenditures, you may submit your protest to the Executive Committee ... which will then review your objections and issue its determination." Plaintiff Hudson took no further action with respect to CTU. She testified that she thought it was unreasonable for CTU to ask her to take the trouble to go to the union office when CTU could have sent her the requested information. Furthermore, she did not consider the "informational conference" to be part of the Implementation Plan, but rather that CTU was "just giving [her] the runaround to make more trouble so that [she] would drop it."

Plaintiffs contend first that all seven plaintiffs have objected and continue to object to some portion of the fair share fee deducted from their paychecks. Second, plaintiffs contend that CTU never notified any plaintiff of any determination concerning his or her objections, nor did it inform any plaintiff that his or her letter failed to satisfy the Implementation Plan so as to trigger the review procedure. Defendants' answer that none of the plaintiffs registered objections as defined in the Implementation Plan, that the review process was, therefore, never triggered, and that CTU clearly so notified plaintiffs by letter.

This Court finds that plaintiffs McCoy, Holmes, and Petitan clearly registered no objection to payroll deductions other than by filing this suit long after the 30-day objection period had expired. The letters sent by plaintiffs Holmes and Sherrill could not reasonably be viewed as objections within the definition of the Implementation Plan. A properly submitted objection, according to the Plan, had to be made "within 30 days *after* the first salary payment" by a "non-member employee *making* such payments" (emphasis added). Both Holmes and Sherrill sent their letters of protest on November19, *before* any deductions had been made. CTU was fully justified in interpreting the two identically worded letters as insufficient to trigger the review process. The form letter which CTU sent back to Holmes and Sherrill, accompanied by the Implementation Plan, was a conscientious attempt to warn the two plaintiffs that their letters had not triggered the review process coupled with explicit instructions on how to raise a proper objection. If Holmes or Sherrill initially believed that they had registered a formal objection, such belief was clearly no longer reasonable after receiving CTU's response. The failure of these two plaintiffs to further pursue their protest within 30 days after the first deduction negates their contention that they had objected and continued to do so.

The Court further finds that plaintiffs Hudson and Underwood both substantially complied with the requirements of the Implementation Plan in submitting written complaints. Plaintiff Underwood sent her letter of objection *after* her first payroll deduction, specifically characterized her protest as an "objection," requested that the president of CTU consider it, and demanded a rebate. It was unreasonable on the part of CTU to view Underwood's communication as anything other than a formal objection.[8] In this context, the same form letter as sent by CTU to Holmes and Sherrill took on a different meaning. Plaintiff Underwood could reasonably interpret CTU's letter to mean that she had, in fact, complied with the procedure by filing a proper complaint. It was reasonable for her to await further communication from CTU and to take no further steps. Hence, the Court finds that plaintiff Underwood's objection is still pending.

For essentially the same reasons, the Court finds that plaintiff Hudson filed a proper objection, and that her objection is still pending. That the first exchange of correspondence between Hudson and CTU was identical to that between Sherrill, Holmes and CTU is of no real import, because in the case of Hudson, the exchange took place *after*, not before, the first payroll deduction. While it is true that Hudson's second letter, wherein she asks for a full disclosure of expenditures, is not a complaint, there was no need that it be construed as one: She had already registered a proper complaint, received from CTU what she reasonably considered a confirmation of that fact, and was now making a related but separate request. That she chose not to pursue her request in no way nullifies her earlier complaint. The most that

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[8] That Underwood demanded the return of *all* rather than some of her deductions is immaterial. The Court is dealing here with a rebate procedure for school teachers, not elaborate trial pleadings involving skilled attorneys.

could be said for CTU is that Hudson, in failing to respond to CTU's second letter, was uncooperative. Hudson was not necessarily unjustified in believing that she was getting the "runaround" from CTU.

III. The Fair Share Calculation

Plaintiffs also challenge CTU's calculations of the 1982-83 fair share fee as incomplete and inaccurate, and itemize approximately $110,000 worth of union expenditures which, they claim, are unrelated to collective bargaining with the Board, and which should be deducted from the fair share fee. The Court need not consider in detail the two dozen disputed items, which would at most change the non-compensable expenditures from 4.5946 percent to 7.2751 percent of union dues. Nor need it rule on what portion, if any, of the $2,167,000 of payments by CTU to affiliated state and national labor organizations, is unrelated to collective bargaining expenses between CTU and the Board. Likewise, the Court may pass over plaintiffs' challenges to expenditures for the union newspaper and for certain salaries, which are claimed to further only in small part, CTU's collective bargaining efforts. For reasons discussed below, the Court agrees with defendants that these matters should be deferred to the internal rebate procedure established by the Implemention Plan established for the very purpose of reviewing the union's calculations and determining if a rebate is due. Plaintiffs Hudson and Underwood, having filed valid objections still pending under the Implementation Plan, and equipped with the facts and figures obtained during discovery, are in an excellent position to work out their challenges with CTU under the impartial arbitrator provided for in the Implementation Plan. Should arbitration prove unsatisfactory, plaintiffs would be free, of course, to avail themselves of any available relief in the courts.

CONCLUSIONS OF LAW

The Court finds, and the parties do not dispute, that it has jurisdiction of this case under 28 U.S.C. §§ 1331, 1343 and 2201.

I. Constitutionality of the Statute on Its Face

This case presents essentially six issues for resolution.[9] The first of these is plaintiffs' constitutional challenge to Ill.Rev.Stat. ch. 122 ¶ 10-22.4a (1981), which is claimed to be unconstitutional on its face. Plaintiffs claim that the statute violates their First Amendment rights of freedom of association, and their Fourteenth Amendment rights to procedural due process and equal protection.

Both plaintiffs and defendants correctly note that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), is the starting point for analysis. In *Abood*, the Detroit Board of Education entered into an exclusive bargaining agreement with the Detroit Federation of Teachers. Among the terms of that agreement was one which required every employee represented by the union—even if not a union member—to pay to the union as a condition of employment a "service fee" equal in amount to

[9] In their initial complaint and motion for preliminary injunction, plaintiffs claimed that the statute and the CTU Implemention Plan violate the Illinois Constitution. In light of plaintiffs' subsequent failure to cite any authority or pursue any argument to the contrary, the Court reads the relevant clauses of the Illinois Constitution as co-extensive with the First and Fourteenth Amendments of the U.S. Constitution. *See, e.g., In Re Air Crash Disaster near Chicago, Ill., etc.*, 644 F.2d 594 (7th Cir. 1981); *Friedman and Rochester Ltd. v. Walsh*, 67 Ill.2d 413 (1977); *Knight v. Bd. of Education of Tri-Point Community Unit School District No. 6J*, 38 Ill.App.3d 603 (1976); Constitutional Commentary to Ill. Const. art. I § 2 (Smith-Hurd 1981). Hence the Court's holdings with respect to the federal constitutional issues subsume any parallel state constitutional issues.

union dues. The Board had agreed to this clause under authority granted by a Michigan statute. Non-union members claimed that this "agency shop" provision violated their First Amendment associational rights. The Court recognized that such provisions did affect freedom of association, noting that:

> To compel employees financially to support their collective bargaining representative has an impact on their First Amendment interests . . . To be required to help finance the union as a collective bargaining unit might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.

431 U.S. at 222.

At the same time, the Court found "important government interests" which "presumptively support the impingement upon associational freedom created by the agency shop here at issue." *Id.* at 225. The dual interests of the government were first, maintaining labor peace and second, eliminating the risk of "free riders" such as workers who enjoyed improved working conditions without contributing to the costs of achieving them. *Id.* at 224.

In *Abood*, the Court balanced the competing interests as follows: "insofar as the service charge is used to finance expenditures by the union for the purposes of collective bargaining, contract administration, and grievance adjustment," precedent "appears to require validation of the agency-shop agreement before us." *Id.* at 225-26. Where, however, non-members are forced to pay more, they "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 234.

Turning to the case at bar, this Court holds that Ill. Rev. Stat. ch. 122, ¶ 10-22.40a (1981), passes constitutional muster under *Abood*. First, it empowers the Board to agree to no more than that which the Supreme Court expressly approved in *Abood*. The grant of authority in the statute limits the Board's power to agree only to a fair share fee that is the non-union members' "proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required of members." The express legislative mandate is that the Board may take no action that would infringe on a non-member's fundamental First Amendment rights.

Second, the statute, on its face, does not violate plaintiff's procedural due process rights. To be sure, the statute is silent on how the fee is to be calculated and by whom, the precise mechanism for payroll deductions, and the procedure available to non-members to obtain impartial review of the fair share fee determination or deduction. But the statute's failure to address these issues does not render it unconstitutional on its face. In attacking the facial validity of a state statute on constitutional grounds, it is well settled that the challenger must overcome a strong presumption of legislative validity. *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1973). When a statute is reasonably capable of a construction compatible with the Constitution, the courts are required to so construe it. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981).

This Court cannot construe the statute's silence as precluding a fair and accessible process for determining the amount of the fair share fee or the means to redress any grievances by non-members. It is far more reasonable to assume that the Illinois Legislature saw fit to leave to the school boards and their exclusive bargaining representatives the working out of the administrative details in full compliance with the statute in their

individual contracts. That the legislature could have provided more specific procedural guidelines, as have the legislatures in some other states,[10] does not invalidate the approach taken here. Apparently, the Illinois lawmakers opted to give flexibility and a maximum of freedom to the contracting parties in developing their fair share fee deduction systems, contemplating that the due process and equal protection concerns of individual non-members would receive adequate attention from the local school boards, which are public bodies and creatures of the legislature.

Statutes similar to that in Illinois have withstood constitutional challenge. The challenged statute in *Abood*, for example, was silent on the question of procedural due process.[11] This did not, however, prevent the U.S. Supreme Court from finding the statute constitutional on its face. Likewise, in Minnesota, the Minnesota Supreme Court upheld the constitutionality of the 1973 version of the state's fair share fee statute that contained no mention of any procedural due process safeguards.[12] *Robbinsdale Education Association v. Robbinsdale Federation of Teachers*, 307 Mn. 96, 239 N.W.2d 437 (1976), vacated and remanded, 429 U.S. 880 (1976), *aff'd sub nom, Threlkeld v. Robbinsdale Federation of Teachers*, 316 N.W.2d 551 (Minn. 1982), *app. dismissed*, U.S. , 103 S.Ct. at 24 (1982). Finally, in *Association of Capitol Powerhouse Engineers V. Washington*, 89 Wash.2d 177, 570 P.2d 1042 (1977), the Washington Supreme Court upheld the constitutionality of a statute which made no specific mention of procedural safeguards for non-member employees objecting to fair share fees. These precedents lend support to this Court's determination that on its face, Ill. Rev. Stat, ch. 122 ¶ 10-22.40a (1981), does not violate plaintiff's due process rights.

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[10] See note 13, *infra*.

[11] Michigan Comp. Laws § 423.210(1)(C)(1973).

[12] Minnesota Stat. 179.65 subd. 2(1973).

Plaintiffs' third facial challenge to the statute is an equal protection challenge. In essence, plaintiffs argue that union members and non-members are treated differently under the law solely on the basis of their exercise of their First Amendment rights. The claimed impermissible distinction is twofold: first, union members are empowered by virtue of their membership, to determine through their votes the amount to be spent by their officials on contract negotiations and administration, whereas non-members are prohibited from so participating. Second, the statute requires the Board to automatically deduct fair share fees from non-members' salaries but not from the salaries of union members.

The first contention is without merit. The right to vote on internal union affairs is not extended or withheld by the state, but rather is the natural consequence of union membership. If non-members wish to participate in the decision-making process, they have only to join the union. This is, however, precisely what plaintiffs do not want to do. Short of disenfranchising union members or giving non-members voting rights, there is no way the Court can protect plaintiffs from the logical and inevitable consequences of a choice which they knowingly and voluntarily made. A challenge similar to that raised here was rejected by this Court in *Afro-American Police League v. Fraternal Order of Police*, 553 F.Supp. 664 (N.D. Ill. 1982). There, plaintiffs complained, *inter alia*, that as non-FOP members, they were not entitled to vote on the collective bargaining agreement. This Court held that there was no duty imposed on the union requiring it to allow non-members to vote on the contract. "The only obligation owed such non-members by the union is the duty of fair representation. That duty is not violated by the mere failure of the union to allow the non-members to vote on the contract." 553 F.Supp. at 668.

The second leg of plaintiffs' equal protection challenge is based on an erroneous version of the facts, and can thus be disposed of quickly. While the statute speaks only to deductions from non-members' salaries for collective bargaining expenses, union members are under no less compulsion to pay than are non-members. They may, it is true, pay union dues in a lump sum in advance, or they may pay a prorated share of their dues on a monthly basis by authorizing the Board to make payroll deductions. The only option not available to non-members is the relatively unattractive one of paying the entire fair share fee upfront.[13] It is ironic that plaintiffs, who mount basic objections to the amount of fair share fees and the allegedly peremptory method in which they are collected, are also heard to complain that they are being deprived of the right to pay the contested fee in advance in a lump sum.

To conclude, the statute classifies not on the basis of exercise of First Amendment rights, as plaintiffs would argue, but rather on the basis of the payment or non-payment of the costs of collective bargaining, the benefits of which are received by all. The law does no more than assure that all those similarly situated—employees benefitting from improved conditions of employment—be treated in the *same* fashion—by being required to pay a proportionate share for the benefits received.

II. Constitutionality of the Statute as Applied

The second major issue raised by plaintiffs is that the Illinois statute is unconstitutional *as applied*. Plaintiffs maintain that the administrative scheme agreed upon by the Board and CTU in Article 1 §8.2 of the collective bargaining agreement and further embodied in the "CTU Implementation Plan" violates the First and Fourteenth Amendments. Plaintiffs' brief identifies several

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[13] The Court notes that an overwhelming number of union members have rejected this option.

specific aspects of the administrative arrangements which they find objectionable.[14] These various alleged infirmities appear to focus on different aspects of the same underlying argument:

> 1) The CTU Implementation Plan violates non-members' First Amendment rights because it is designed and controlled by CTU and it is administratively cumbersome.
>
> 2) Even if the CTU procedure is not cumbersome, any type of rebate procedure is *per se* violative of the First Amendment because it permits use of non-members' funds for purposes condemned by *Abood*—even if only on a temporary basis.
>
> 3) The "CTU Implementation Plan" violates non-members' procedural due process rights.

In *Perry v. International Ass'n. of Machinists Local Lodge 2569*, 708 F.2d 1258 (7th Cir. 1983), the Court of Appeals for this Circuit noted the variety of arrangements among the states for handling non-members' objections to fair share fees. The Seventh Circuit, without itself taking a position on the issue, recognized a split among the courts on whether a rebate procedure is a constitutionally sufficient safeguard for a potential violation of the First Amendment. 708 F.2d at 1261. Some courts have found rebate procedures sufficient to protect an employee's rights. *See, e.g., Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 685 F.2d 1065, 1070 (9th Cir. 1982); *Browne v. Milwaukee Board of School Directors*, 83 Wis.2d 316 (1978); *White Cloud Educational Ass'n. v. Board of Education*, 101 Mich.App. 309 (1980). Other courts have held that an agency fee system requiring continual payments and subsequent refunds

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[14] These include: (1) it is CTU that sets the fee that it is to receive; (2) there is no provision for review of the amount of the fee by the Board; (3) non-member employees have no notice or opportunity for a hearing prior to deductions; (4) the rebate procedure is designed and operated by the union, not a detached, neutral tribunal; and (5) the rebate procedure is cumbersome.

to claimants does not satisfy the requirements of the First Amendment. *See, e.g., Robinson v. State of New Jersey*, 547 F.Supp. 1297, 1321 (D.N.J. 1982); *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70 (1982).

Analysis of the CTU rebate procedure must proceed in light of the Seventh Circuit's opinion in *Perry v. I.A.M., supra.* There, the Court noted that, whether or not a rebate procedure is *per se* constitutional, "all courts have agreed that, at least, a rebate system must be fair, administered in good faith, and not cumbersome." *Perry, supra*, 708 F.2d at 1262. In keeping with *Perry*, the first step in analyzing the CTU Implementation Plan is to determine whether it meets these three criteria. The task is, by necessity, speculative, since the procedure has not yet actually been used. Nevertheless, this Court cannot conclude that the CTU rebate procedure is unfair, administered in bad faith, or cumbersome.

First, there is nothing unfair in the way the rebate procedure is designed to be administered. Plaintiffs maintain that a rebate procedure designed by the union and administered internally is fundamentally flawed under the principle that "no man should be a judge in his own case." They suggest that a "closed-door review of their objections by the very people that presumably violated their rights in the first place" is unlikely to yield a fair or impartial hearing.

That there is nothing fundamentally unfair about an internal union procedure finds support in several cases. In *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963), the Supreme Court suggested that a more practical option than judicially administered relief would be for unions "to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy." 373 U.S. at 122. In *Abood, supra*, the Court found the *Allen* suggestion "particularly relevant" in light of the union's newly adopted internal

procedure. 431 U.S. at 240. The *Abood* Court stressed that it expressed no view as to the sufficiency of the internal remedy actually in use in Michigan, but nevertheless suggested that on remand, the dispute over the fair share fee be referred to the internal union remedy as a possible means of settling the disagreement. *Id.* at 242.

In *Capital Powerhouse Engineers v. State of Washington, supra,* the Washington Supreme Court approved of a publicized, readily accessible internal union mechanism for dealing with political expenditures by the union to which an employee objects. 570 P.2d at 1049. Likewise, in *Carlson v. City of Portland,* 45 Or.App. 439, 608 P.2d 1198 (1980), an Oregon appellate court endorsed internal union procedures available for contesting the amount of deductions. 608 P.2d at 1202.

Although there may be a question as to whether an internal union procedure in a given context is fair, there appears to be consensus among the courts that have considered the question that there is nothing inherently unfair about an internal union procedure. *See, e.g., Reid v. U.A.W., District 1093,* 479 F.2d 517 (10th Cir. 1973); *Seay v. McDonnell Douglas Corp.,* 533 F.2d 1126 (9th Cir. 1976). In *Seay,* the court refused to rule as a matter of law that an internal union procedure was inherently fair or unfair. "[S]peculative, conclusionary, and argumentative statements condemn[ing] the Union remedy as unfair, unreasonable, and unworkable ... do not suffice to create an issue of fact .... At the most the statements are conjectures as to how the union remedy might work in imagined circumstances." 479 F.2d at 520.[15]

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[15] The plaintiffs in *Seay,* unlike those in *Reid v. U.A.W. District 1093,* 479 F.2d 517 (10th Cir. 1973), *had* presented genuine issues of fact as to whether the union could or would administer the intra-union remedy fairly. As a result, the Court remanded the case for further investigation.

In light of *Seay* and *Reid,* the Court now turns to the facts of the instant case. The CTU Plan allows a hearing before an impartial tribunal in the person of an accredited arbitrator prescreened by the Illinois State Board of Education. Arbitration is available to a complainant in as little as 75 days from the day his or her objection is properly raised. CTU freely admits that throughout the process it bears the burden of showing that the fair share deduction complies with the *Abood* criteria, and had, in fact, offered access to its records to one of plaintiffs for purposes of preparing her case in this regard. These facts suffice to dispel plaintiffs' fears that the procedure allows CTU "to be a judge in its own case." The safeguards built into the system insure that it is fair.

The next consideration is whether the CTU Implementation Plan is a good faith effort. Plaintiffs claim that the plan is a "sham ... designed only to give lip service to due process," and that CTU "never had any intention of permitting non-members to contest CTU's fair share fee." However, no evidence is presented to support this allegation. All of the evidence, in fact, points in the other direction. CTU widely publicized the Implementation Plan. The union carefully documented its calculation of the fair share fee and offered one plaintiff an opportunity to inspect the record. The union readily concedes typographical and mathematical errors of some $12,000 identified by plaintiffs during discovery; there is no reason to believe that the union would not have made a similar concession had the error been discovered during the internal procedure. It is true that CTU did unreasonably misconstrue the letters of plaintiffs Hudson and Underwood as something other than properly filed objections. However, the rebate process was a new one. Based on testimony at trial, the Court is inclined to view CTU's failure to expedite these two objections as an error in judgment due to excessive caution rather than bad faith.

Finally, in keeping with *Perry v. I.A.M., supra*, the Court must inquire whether the CTU Implementation Plan is cumbersome. The rebate procedure is a simple three-step process which can be completed within a little as 75 days of a non-member's sending an objection to CTU. The procedure was widely publicized prior to its inception, and all those who contacted the union received a copy of the procedure, drafted in terms readily understood by laypersons. Objecting non-members were given a full month after the first payroll deduction to register their objections. The cost of the procedure is to be borne by CTU.

The simplicity of the CTU rebate process stands in sharp contrast to those struck down in such cases as *Perry, supra*, and *Robinson v. State of New Jersey, supra*. In *Robinson*, for example, the court consolidated the internal procedures of three unions for review. In one of the procedures, the objector had to fill out a form stating his reason and information for the complaint, and wait over 90 days for a first hearing. Internal delays, traced in part to the multi-tiered union system, postponed for over a year notification by the union of its rejection of the objector's claim. Under the procedure set up by a second union, the experience of objectors was, if anything, worse. The procedure required a written objection be made within 30 days of the first deduction, which would result in an escrowing of deductions for 12 months until the year's fiscal records were complete. At that point a second challenge had to be mailed, to be disposed of "informally" by the Union. If still unsatisfied, the complainant had to mail out yet another challenge, this time to a regional panel. After that, the objector was referred to a statutory body, the three-member State Representative Fee Review Board. In both unions, the information documenting the calculations of the rebates was so inadequate as to shift the burden of proof onto the objectors.

In *Perry v. I.A.M., supra*, an objector had only two weeks to mail an objection—to both the union headquarters and to the local. A two-tiered hearing procedure followed, first before a committee of the union, and then before the union's executive council. The objector apparently bore the burden of establishing error. Up to 18 months could elapse before the fair share fee was refunded. There was no provision for neutral arbitration. Further, the union made no attempt to explain the rebate procedure to the objector-plaintiff.

To conclude the review of the facts in the case at bar, this Court perceives significant differences between the CTU Plan and those other internal rebate procedures correctly rejected in *Robinson* and *Perry*. It should be stressed that this conclusion is necessarily based on the plan *as designed*, since there is, as yet, no actual experience with it. If, at some future date, plaintiffs can show that the actual operation of the procedure is unreasonably lengthy or expensive, the CTU has been uncooperative or obstructive, or that CTU's initial calculation of the fair share fee was so clearly misstated as to infer bad faith, then the Court would not hesitate to strike down as unconstitutional the CTU Implementation Plan. Under the facts of the instant case, however, the Court is simply unable to discern anything unfair, administered in bad faith or cumbersome about the CTU rebate plan. Consequently, the Court is unable to avoid squarely facing the issue on which the Seventh Circuit reserved judgment in *Perry, i.e.*, whether a rebate procedure undertaken in connection with a fair share deduction from non-union members' paychecks may, under certain circumstances, adequately protect non-members' First Amendment rights under *Abood*.[16]

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[16] The Court notes that the U.S. Supreme Court has granted certiorari in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks* (82-1150, 51 L.W. 3746, Apr. 18, 1983). One of the questions presented there is whether, when a union collects and

In considering whether a rebate procedure is *per se* unconstitutional, both the First and Fourteenth Amendments are implicated. When First Amendment interests are at stake, the least restrictive means of effectuating government interests must be employed. *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Perry*, 708 F.2d at 1262. As noted earlier, the government has a compelling interest in maintaining labor peace and in eliminating the risk of "free riders." *Abood*, 431 U.S. at 224. The Supreme Court has recognized that unions must have access to substantial funds in order to carry out their obligations—both to members and non-members:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. *See, Street*, 367 U.S. at 760. The services of lawyers, expert negotiators, economists and a research staff, as well as general administrative personnel, may be required.

431 U.S. at 221.

A system that requires non-members to contribute a fair share fee, subject to subsequent reimbursement if the contribution turns out to be in excess of *Abood*-permitted union expenditures, is among the most effective ways to provide the union with the

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spends compulsory union dues and agency fees for purposes other than negotiation and administration of the collective bargaining agreement, a scheme that allows for a subsequent union-determined rebate of a portion of dissenting employees' dues or fees satisfies the requirements of the Railway Labor Act and the First Amendment.

The CTU's pressing need for funds makes prompt resolution of this suit important, and does not permit this Court to await the outcome of the Supreme Court's decision.

timely, steady, dependable flow of revenue to which it is entitled. The drawback to a rebate system is that it may temporarily appropriate and spend a portion of non-members' contributions for purposes impermissible under *Abood*, thus violating, even if only for a short period of time, non-members' First Amendment rights.

Prior case law is, unfortunately, of little assistance in reaching a definitive answer to the issue of whether a rebate procedure may be constitutional. In *International Ass'n. of Machinists v. Street*, 367 U.S. 740 (1960), the Supreme Court suggested a remedy for employees dissenting over the union's expenditure of a portion of their contributions for political activities. The remedy suggested was "*restitution* to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." 367 U.S. at 775. This remedy, noted the Court, could be enforced "with a minimum of administrative difficulty and with little danger of encroachment on the legitimate activities or necessary functions of the unions." *Id.* at 774.

Likewise, in *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1962), the U.S. Supreme Court suggested a "practical" remedy for an employee complaining that the union had spent a portion of his contribution in violation of his First Amendment rights:

> (1) the refund to him of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion.

373 U.S. at 122.

Later, in *Abood*, the Court found *Allen's* suggested remedy "particularly relevant" to the Michigan fair share fee system, since the Michigan union had set up an internal remedy which provided, *inter alia*, for a "pro rata *refund*" to a dissenting

employee of a portion of his fair share fee. 431 U.S. at 240, n. 41 (emphasis added). The Court stated that, on remand, it would be appropriate to defer judicial proceedings pending a voluntary utilization by the parties of the rebate system. *Id.* at 242. At the same time, the Court added, "We express no view as to the constitutional sufficiency of the internal remedy described by the appellees." *Id.*, n. 45. Whether the Court was reserving judgment on rebate procedures in general or simply on the one in Michigan has been a subject of some controversy. *See, School Committee of Greenfield v. Greenfield Education Ass'n,* 385 Mass. 70 (1982); *Capital Powerhouse Engineers v. State of Washington,* 89 Wash.2d 177 (1977). In our Circuit, the Court of Appeals, in *Perry v. I.A.M., supra,* underscored the issue, but found it unnecessary to resolve it under the facts of that case. 708 F.2d at 1261-62.

Turning to decisions in other jurisdictions, this Court is constrained to view the statements of those courts finding rebate procedures *per se* unconstitutional as having limited precedential value as their holdings are ultimately based on the very specific facts of the procedures in question. Illustrative is *Robinson v. State of New Jersey,* 547 F.Supp. 1297 (D.N.J. 1982). There, the court stated, "When confronted with the realities . . . in this case, . . . it becomes apparent that a demand and return system cannot protect a non-member's First Amendment rights." *Id.* at 1322. Elsewhere in the same opinion, the court said that the rebate procedure in New Jersey "in reality . . . does not constitute a system by which a non-member can recover that portion of the fees paid by him . . ." *Id.* In the last analysis, the *Robinson* court appears to have struck down the procedure not as a rebate system, *per se,* but as an unusable rebate system.

In the absence of persuasive precedent, a decision on the CTU rebate procedure must ultimately be resolved under the "least restrictive means" test in *Kusper v. Pontikes, supra,* as applied to

the specific facts of the case at bar. Of major significance in the instant case is that before any fair share fee may be deducted, a prior adjustment must first be made to account for, and exclude *Abood*-prohibited expenditures. This front-end reduction in fees is mandated by the Illinois legislature in Ill. Rev. Stat. ch. 122 ¶ 10-22.40a, and built into the collective bargaining agreement between CTU and the Board in Art. 1, §8.2. From the evidence presented at trial, it appears that CTU made a thorough analysis of its financial records in good faith compliance with both the statute and its agreement with the Board. As a result, non-members were *not* required to contribute an amount equal to union dues, as allowed in some states,[17] or an arbitrary, predetermined percentage of dues, as allowed in others.[18] Instead, non-members were required to contribute only a carefully pre-calculated portion of union dues. Of course, the union's calculations might be inaccurate or reflect errors in judgment. As a practical matter, however, such errors should require only minor refinement of the fair share fee. Thus, the pre-deduction adjusting of the fair share fee successfully minimizes the risk of unauthorized expenditure of non-members' funds. To the extent that minor correction is required, the rebate procedure allows for impartial arbitration within as little as two and one-half months from the date of the first deduction.

To be sure, in this, the first year of CTU's calculation of the fair share fee, the margin for error is greater than it should be in subsequent years, because many of CTU's basic judgments as to the political nature of certain expenditures are subject to challenge. For example, $2,167,000 of CTU's income of $4,103,701.58 was passed on to affiliated state and national labor organizations, an expenditure which plaintiffs challenge under *Abood*. But even assuming, *arguendo*, that CTU had grossly

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[17] For example, Michigan.

[18] For example, New Jersey and Minnesota.

miscalculated the fee—let us say by as much as 50 percent—the error over the six-week rebate gap would add up to only $24.72 per school teacher (based on a monthly deduction of $16.48). A brief withholding of less than $25, weighed against the union's legitimate need for revenue, suggests just how carefully drawn the rebate plan actually is. More importantly, such major discrepancies will present only a one-time problem. Once resolved, the margin of error in fair share calculations should shrink to minimal dimensions in future years.

In conclusion, under the test in *Kusper v. Pontikes*, the rebate procedure embodied in the CTU Inplementation Plan presents so small a risk of violating non-members' First Amendment rights as to be negligible, and is, at the same time, the most effective, efficient way to guarantee to CTU the immediate, steady flow of funds it needs to represent *all* employees, including non-members. As such, the CTU Implementation Procedure is the least restrictive means of effectuating government interests.

The same caveat mentioned earlier applies to the Court's holding here: the instant decision is based on the facts presented. Should non-members, at some future date, successfully demonstrate that the union is calculating the fair share fee in bad faith, unduly encumbering the rebate procedure, or in any other way acting unfairly, a violation of the First Amendment may well be found to exist. Under the present circumstances, however, there is simply no basis to find the CTU Plan offensive.

The final issue plaintiffs raise is that the CTU Implementation Plan violates their procedural due process rights under the Fourteenth Amendment. They claim that they are entitled to prior notice and a hearing before they may be deprived of wages or freedom of association.[19] This Court has already determined

[19] Plaintiffs argue that the School Board has a duty to verify the fair share calculation and provide a pre-taking forum for

that plaintiffs' First Amendment rights have not been violated. As for the deprivation of property accomplished through the CTU rebate procedure, this Court holds that it fully comports with the Fourteenth Amendment.

Plaintiffs put forward a creative argument for their position. They view the principle behind the fair share fee requirement as analogous to the remedy of *quantum meruit*, and thus cast the union and non-members in the respective roles of creditor and debtor. Under the rebate procedure, they argue, CTU dictates the amount of the "debt" to be collected from non-member employees. Hence, according to plaintiffs, "the role of the School Board is nothing more than the enforcer of a prejudgment garnishment demand by the Local Union." Completing their argument, plaintiffs cite *Fuentes v. Shevin*, 407 U.S. 67 (1972), for the proposition that it is a denial of procedural due process to garnish wages without first providing notice and an opportunity to be heard.

This argument, at first glance, has a certain appeal. A closer look, however, reveals that there is but a superficial resemblance between the payroll deduction plan at issue here and the type of prejudgment garnishment struck down in *Fuentes*. One example,

dissenting non-members. The Court questions whether the Board, as employer, is the appropriate party to champion the constitutional rights of its employees in a dispute against the exclusive bargaining representative. For any employer—public or private—to be placed in a position of exercising a veto over a union's allocations and expenditures would create a serious imbalance in bargaining power. *Metropolitan Edison Co. v. NLRB*, *U.S.* , *103 S.Ct. 1467, 1475 (1983); cf. Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In the last analysis, it is the non-member employee who is the real party in interest, and who should bring the challenge. *Cheshire Board of Education*, Case No. TDR-7008, Dec. No. 2153, Govt. Employee Relations Report, 980.20-21 (August 26, 1982).

of several possible distinctions, suffices to demonstrate why the analogy is misleading. To the extent that the analogy has any merit, the "garnishment" in question has more in common with a *post*-judgment than the prejudgment procedure present in *Fuentes*. Both the Supreme Court, in *Abood*, and the state of Illinois, by statute, have already recognized that non-members do, in fact, owe money to their exclusive bargaining representative. Thus, unlike a prejudgment garnishment proceeding, where the very existence of a debt may be at issue, the rebate procedure in the instant case proceeds from certainty on this crucial point.[20]

Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 610 (1974). Rather, due process is flexible, calling for such procedural protections as the situation demands. *Id.* "[T]he right to notice and an opportunity to be heard must be granted at a *meaningful* time and in a *meaningful* manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (emphasis added). To determine whether a given administrative procedure comports with due process, the conflicting interests of the government and private parties must be balanced in light of three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that an additional or substitute procedural requirement would entail. *Mathews, supra*, 424 U.S. at 335.

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[20] A prior hearing with respect to a post-judgment garnishment is not necessarily required under the *Fuentes* line of cases. *See, e.g., First National Bank v. Hasty*, 410. F.Supp. 482 (E.D.Mich. 1976); *Betts v. Coltes*, 431 F.Supp. 1369 (1977), 467 F.Supp. 544 (D. Haw. 1979). *Cf. Finberg v. Sullivan*, 634 F.2d 50 (3rd Cir. 1980).

Using this three-prong balancing test in the instant case, this Court concludes that the scales tip heavily in favor of the CTU rebate plan. As will become evident, the *Mathews* balancing test recapitulates much of the reasoning of the Court's earlier discussion. As to the first factor, the affected interests of non-members are their First Amendment rights of freedom of association plus their property interest in the amount of wages deducted. Second, the risk of an erroneous deprivation of either interest through the CTU Plan, even during this first year of operation, is minimal because of the statutory requirement, fully complied with by the CTU Plan, that a pre-deduction adjustment be made in the fair share fee. An opportunity to challenge the amount of the calculated fee would, it is true, minimize an already very small margin of error. Yet, the marginal cost of this incremental reduction in risk is unreasonably high. Finally, the governmental interests involved are compelling, and the cost of depriving the union of a steady, dependable source of income is inordinately burdensome.

In sum, the compelling state interest, coupled with the extremely low risk of an abridgement of non-members' rights, clearly does not justify the high cost of imposing an additional prededuction hearing. *Robbinsdale Education Assn. v. Robbinsdale Fed. of Teachers*, 307 Minn. 96, 239 N.W.2d 437 (1976), *aff'd. sub. nom. Threlkeld v. Robbinsdale Fed. of Teachers*, 316 N.W.2d 551 (Minn. 1982), *dismissed*, U.S. , 103 S.Ct. 24 (1982).

The situation here is easily distinguishable from the *Fuentes* line of cases. First, the risks are of altogether different orders of magnitude, because in the instant case, the existence of a "debt" is already established, and the amount in question is subject to only minor adjustment. Second, the governmental interests implicated in a fair share fee are qualitatively and quantitatively more substantial than those of a private creditor. *Cf, Finberg v. Sullivan*, 634 F.2d 50 (3rd Cir. 1980).

III. Conclusion

For the foregoing reasons, the Court holds that Ill. Rev. Stat. ch. 122 ¶ 10-22.40a (1981) comports with the U. S. Constitution both on its face and as applied to the CTU Implementation Plan. As that plan provides a mechanism to determine the propriety of the amount of the fair share fee calculation, those plaintiffs who qualify are directed to proceed through such mechanism in their challenge of the amount deducted. Having ruled the plan to be constitutional, the Court declines the opportunity to decide questions regarding the amount of the fee as such a determination may properly be made under the plan.

Plaintiffs Underwood and Hudson have properly objected to calculation of the fair share fee under the Implementation Plan. The parties are directed to proceed with the claims of these plaintiffs under the scheme set out by the plan. If the amount of the fee is deemed to be excessive, plaintiffs Underwood and Hudson will be entitled to a rebate and, along with all other non-members, to a prospective reduction in the amount deducted. Plaintiffs Sherrill, Holmes, McCoy, and Petitan, by failing to properly object within 30 days after the initial deductions were made, have waived their rights to object and, consequently, because they could not join in the objection, would not be entitled to a rebate should any properly objecting party succeed in securing a reduction in the fair share fee. They would, of course, benefit from such success in that any prospective reduction would reduce the amount deducted from future paychecks. In the event that a deduction were ever made from plaintiff McCoy's paycheck, she could, of course, object within 30 days thereafter. At this juncture, however, any objection by McCoy would be untimely as not ripe under the plan.

In light of the Court's holding herein, no ruling need be made on the plaintiffs' motion to proceed as a class action. Accordingly, such motion is deemed to be moot.

IT IS SO ORDERED.

Nicholas J. Bua
Judge, United States District Court

Dated: November 3, 1983

No. 84-1503 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHICAGO TEACHERS UNION, LOCAL No. 1, AFT, *et alia*,
Petitioners,

v.

ANNIE LEE HUDSON, *et alia*,
Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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24 April 1985

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BRIEF IN OPPOSITION

INTRODUCTION

Pursuant to Rule 22 of the Rules of this Court, respondents Annie Lee Hudson, *et alia*, file this brief in opposition to the petition for a writ of certiorari filed by the Chicago Teachers Union, Local No. 1, AFT (CTU).

COUNTERSTATEMENT OF THE FACTS

Respondents generally accept the CTU's statement of

facts, except for the implication therein (explicitly repeated in later portions of the petition as a "fact") that the "procedure" for challenging the so-called "proportionate-share payments" at issue in this case was somehow "state created", and contemplated direct involvement of the Illinois courts.[1] This implication is decidedly improper. For, except through the Board of Education as the compliant collector of the proportionate-share payments, the State of Illinois has *no role whatsoever* in the alleged procedure, either as its creator, or as its administrator, or as its ultimate supervisor.[2]

First, the statute at issue here neither created nor referred to any procedure for challenging the amount of a proportionate-share payment, instead mandating simply that such payments "shall be deducted by the board from the earnings of the non-member employees and paid to the [CTU]".[3]

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[1] *See, e.g.*, Petition at 18 ("the state has provided [non-union] employees *a right to proceed directly to state court* to raise their objections to the amount of the proportionate share payment"), 19 ("the hearing could have been before a state-court judge *ab initio*"), 19 ("the judicial procedures that already are available to objecting fee payers as a matter of state law"), 20-21 ("it is most explicitly *not* the task of the federal judiciary, in adjudicating constitutional challenges to a hearing procedure established by a State, to assess the wisdom or or [*sic*] lack thereof of a particular state-created procedure").

[2] Thus, it is hardly accidental that the State, including the officers and members of the Board of Education, has chosen not to join in the instant petition. *See* Letter of 27 March 1985, from Charles Orlove, Esq., counsel for petitioners, to the Clerk of the Supreme Court of the United States, notifying the Court that representatives of the Board "will take no part in [this] matter".

[3] Ill. Rev. Stat., ch. 12, § 10-22.40(a) (1983), *quoted* in toto *in* Petition at 2. In as much as the statute rigidly specified that the proportionate-share payments shall be "measured by the amount of [union] dues uniformly required by [*sic*, no doubt 'of' was intended] members", no procedure for challenging the size of the payments was indicated. No doubt realizing the obvious substantive unconstitutionality of a statute that required non-union employees to pay proportionate-share payments equal to dues of full union members, no matter what the true collective-bargaining costs of the union might be, the Illinois legislature enacted a new law authorizing deduction of a "fair share * * * not to exceed the dues uniformly required of members". *See* Petition at 3 n.1. This new law is not at issue here.

Second, the applicable collective-bargaining agreement recites the Board's acquiescence in deductions of proportionate-share payments from the salaries of non-union employees such as respondents, but contains no procedure by which those employees can challenge the amount of or method of imposing the deductions.[4]

Third, the CTU unilaterally informed the Board of the amount of the payments it demanded, without presenting to the affected employees, the Board, or any other agency of the State any evidence tending to substantiate its claims; and without subjecting those claims to any investigation whatsoever by the employees, the Board, or any other state official.[5]

Fourth, docilely complying with CTU's demand, the Board deducted the proportionate-share payments, and transferred the monies to CTU, without even attempting to verify the propriety of its actions.[6]

Fifth, on its own initiative, CTU established what it calls "an appeals procedure" involving written objections by non-union employees to the proportionate-share payments, "an internal union review", and "a decision by

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[4] *See* Petition at 4.

[5] *See id.*

[6] *See id.*

an impartial arbitrator" whom CTU selects.[7]

Nowhere in this union-created and union-controlled "appeals procedure" is there any meaningful mandatory involvement of the State (excepting, of course, the Board's complicity as collection-agent). To be sure, the State may eventually intervene if dissenting employees either: (i) challenge the CTU's arbitration-award in court; or (ii) initiate a separate lawsuit on their own.[8] But to imply, as CTU repeatedly does, that the state courts are *part of* its "appeals procedure" is patently untrue, their involvement (if any occurs) being wholly contingent on affected employees' going *beyond* the "procedure" or *outside of* it altogether.

In effect, the stark facts are these: With the assistance of the Board, CTU has told non-union employees, "We intend to seize the portion of your salaries that we say we are entitled to have; and if you want to complain about it, either avail yourselves of our 'internal union review' and arbitration-scheme (being bound thereafter by the limitations on judicial review that Illinois imposes on arbitration-awards), or sue us on your own in state court." The "procedure" that CTU offers these employees, then, is *employee-initiated litigation*, either after or without arbitration. In short, CTU takes their money and then tells dissatisfied employees: "Sue us!"

REASONS FOR DENYING THE WRIT

Given the facts of this case, granting a writ of certiorari would be improvident, for three reasons. *First*, the CTU's self-generated and self-applied "appeals procedure" lacks procedural due process on its face. And the Court of Appeals' recognition of this demerit reflects nothing more than that court's application of the substantive rule of *Abood* v. *Detroit Board of Education*[9] to the procedural-due-process context. *Second*, to adopt the CTU's interpretation of this Court's summary dismissals of *Jibson* v. *White Cloud Education Association*[10] and *Kempner* v. *Local 2077, AFSCME*[11] would require overruling this Court's plenary decisions in both *Abood* and *Ellis* v. *BRAC*[12]. And *third*, review of a case such as this is premature, absent development of a full factual record describing the actual workings of an arguably proper proportionate-share-payment scheme.

[7] *See id.* at 4-5.

[8] *See id.* at 5.

I. Far from being "unprecedented", the Court of Appeals' decision is the logical procedural-due-process application of the substantive teaching of *Abood* v. *Detroit Board of Education*.

CTU complains that "[t]he first error of the [C]ourt [of Appeals] was in finding [that non-union employees have] an expansive—indeed unprecedented—liberty interest" that requires procedural protection.[13] Contrary to CTU's misrepresentations, the Court of Appeals did no such thing. Rather, it faithfully followed *Abood* in holding that any proportionate-share-payment scheme infringes on non-union employees' "liberty" (specifically,

[9] 431 U.S. 209 (1977).

[10] _____ U.S. _____, 105 S. Ct. 236 (1984).

[11] _____ U.S. _____, 105 S. Ct. 316 (1984).

[12] _____ U.S. _____, 104 S. Ct. 1883 (1984).

[13] Petition at 15.

their First-Amendment freedom of association), but that this infringement is constitutional if the union uses the payments to defray its collective-bargaining expenses.[14] The Court of Appeals then applied this substantive teaching of *Abood* to the procedural-due-process context, holding (unexceptionally) that the admitted deprivation of employees' "liberty" is constitutional only if the State has mandated procedures that guarantee that the payments will, in fact and law, subsidize the union's collective-bargaining activities alone.[15]

This holding is hardly "unprecedented", or even mildly surprising. For *all* state action resulting in deprivations of "liberty"—or of "property", which deductions of respondents' proportionate-share payments clearly involve, too—requires procedural due process to be constitutionally valid.[16] Here, that process must include the necessary factual-*cum*-legal determination that the union will use the payments only for collective-bargaining purposes. For, if it does not, the deprivation of "liberty" (and "property") will not satisfy the requirement of *Abood* that justifies it in the first instance. And so even CTU understands, when it says that this Court's "decisions teach that no deprivation of associational freedom occurs *unless an objector's fee is in fact expended for activities not 'germane to collective bargaining'*".[17] Obviously, the

[14] *Contrast id.* at 15-17 *with* Appendix at A-6 to A-8.

[15] *See* Appendix at A-8 to A-9. As the Court of Appeals correctly explained, this Court "in *Abood* had no occasion to decide whether an agency fee * * * may not be exacted unless the dissenter is given due process of law". *Id.* at A-8.

[16] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972); Fuentes v. Shevin, 407 U.S. 67, 84-90 (1972).

[17] Petition at 17 (emphasis supplied).

"unless" qualification implicates a fundamental issue of procedural due process: namely, does the taking occur pursuant to a procedure that guarantees that "an objector's fee is in fact expended [only] for [collective-bargaining] activities"? Thus, CTU refutes itself when it pretends that this Court's decisions do not support—indeed, logically compel—the holding of the Court of Appeals.[18]

If anything is "unprecedented" here, it is CTU's brazen contention that no constitutional problem arises when it and the Board agree to seize monies from the salaries of dissenting non-union employees simply on CTU's unilateral claim of right to those monies, and without any pre-seizure hearing or other process before an impartial governmental agency, simply because the victims—assumedly with CTU's blessing—can thereafter repair to the state courts to protest. On its face, this apology proves too much: For if the procedural-due-process require-

[18] The "unless" qualification that CTU itself articulates requires that, for a proportionate-share-payment scheme *not* to violate non-union employees' freedom of (non)association, there must be a determination, at a meaningful time and in a meaningful manner, of the factual-*cum*-legal question of the relatedness *vel non* of the payment to the recipient union's collective-bargaining activities. If procedural due process obtains, the union will receive and be able to spend no monies from dissenting employees except their share of its collective-bargaining expenses. Conversely, absent procedural due process, a serious likelihood exists that the union will receive and be able to spend non-union employees' monies for *non*-bargaining purposes—which spending, by constitutional hypothesis, equals a deprivation of dissenters' First- and Fourteenth-Amendment liberties. Therefore, the absence of procedural due process in a proportionate-share-payment scheme strongly implies (if it does not insure) a loss of employees' fundamental freedoms, without or in reckless disregard of the absence of the countervailing governmental interest in supporting and subsidizing collective bargaining that *Abood* held justifies such a scheme. Or, the absence of procedural due process almost

ments of the First and Fourteenth Amendments were satisfied whenever and because an individual deprived of liberty or property could later on contest that denial in a state court, the very existence of state courts of general jurisdiction would largely eliminate procedural due process from constitutional jurisprudence.

CTU's contention also assumes what is contrary to fact: namely, that the state courts are somehow an integral part of its proportionate-share-payment scheme. CTU refers to a "hearing procedure established by [the] State"[19]—when, in reality, the state judiciary can intervene only if a dissenting employee *completely disregards* CTU's arbitration-procedure, or attempts to overturn the arbitrator's decision (under the prevailing rule of law limiting judicial review of arbitral action). Thus, contrary to CTU's complaint, the Court of Appeals did not negatively "assess" the "lack [of wisdom] of a particular state-created procedure", or mandate an "ideal" it thought "somehow superior to the judicial process available in Illinois".[20] Rather, the Court of Appeals disapproved of the absence of *any* truly *state*-created procedure *integral* to the seizure of proportionate-share payments, and mandated essentially *any* procedure *free from unilateral union control.*

Simply put, the Court of Appeals found that procedural due process requires more than that CTU dare dissenting employees to "Sue us!" when the union and the

surely equals a violation of *Abood*. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 520-29 (1958).

[19] Petition at 20-21.

[20] *Id.* at 21.

Board conspire to seize part of their salaries as putative proportionate-share payments. If this determination raises a question of constitutional law justifying issuance of a writ of certiorari, the jurisprudence of procedural due process has devolved into a sorrowfully primitive state indeed.

II. Remanding this case for the Court of Appeals to consider this Court's dismissals of *Jibson* v. *White Cloud Education Association* and *Kempner* v. *Local 2077, AFSCME* would waste judicial resources, in as much as CTU's interpretation of those dismissals is palpably erroneous.

To bolster its claim that the Court of Appeals' decision is "unprecedented", CTU cites this Court's unexplicated dismissals of appeals in *Jibson* and *Kempner*, adding its own interpretive gloss to the effect that these decisions impliedly uphold everything it and the Board tried to do to respondents.[21] The short and sufficient answer to this argument is that, whatever this Court's reasons for summarily dismissing *Jibson* and *Kempner*, they could *not* have been the reasons CTU advances, unless this Court meant by those dismissals *sub silentio* also to overrule both *Abood* and *Ellis*.

This Court's summary disposition of appeals "have considerably less precedential value than an opinion on the merits",[22] and constitute precedent only "on the precise issues presented" by "the particular facts involved in a case", rather than indicating general acceptance of the

[21] *Id.* at 9-14.

[22] Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-81 (1979).

reasoning subtending the lower courts' decisions.[23] For that reason, the significance of this Court's action in *Jibson* and *Kempner* must "be assessed in the light of all the facts in [those] case[s]", not simply upon CTU's self-interested interpretation of the questions presented in the appeals.[24]

Vacating the Court of Appeals' decision and remanding this case for that court to speculate on this subject would manifestly waste judicial resources, in as much as no sensible Court of Appeals would hold that the mere summary dismissals in *Jibson* and *Kempner* have radically transmogrified the legal principles this Court so painstakingly explained and applied in its plenary decisions in *Abood* and *Ellis*. Rather, the Court of Appeals would follow this Court's admonition that the summary dismissals should "'not * * * be read as a renunciation'" by this Court of *Abood* or *Ellis*, and "should not be understood as breaking new ground".[25] Instead, the Court of Appeals would simply distinguish *Jibson* and *Kempner* on one or more of many alternative grounds, and then re-instate its earlier opinion, which alone gives procedural-due-process "teeth" to the substantive holdings of *Abood* and *Ellis*.[26]

For example, the Court of Appeals could easily distinguish *Kempner* because the internal union exhaustion-requirement upheld in that case was imposed as a prerequisite to the filing of an administrative complaint by a dissenting employee, not as a bar to judicial relief.

[23] *Id.* at 182-83; Mandel v. Bradley, 432 U.S. 173, 175-77 (1977).
[24] Mandel v. Bradley, 432 U.S. 173, 177 (1977).
[25] *Id.* at 176.
[26] Seen in this light, CTU's petition reduces to an attempt to appeal the

Indeed, the lower court in *Kempner* expressly recognized the availability "of the alternative remedies set forth in *White Cloud* [*Education Association* v. *White Cloud Board of Education*]", an earlier decision of the same court on the same subject-matter.[27] In *White Cloud*, the state court held that a non-union employee can be required to pay a disputed fee to a union before the proper amount of the fee has been judicially determined, only because the employee could "immediately file suit for declaratory judgment" and move for an *expedited* hearing under state law. The court's reason for this holding was that "the employee can quickly move for a resolution of the issue and a vindication of his constitutional rights", a rationale that does not apply where (as here) the employee must first exhaust a time-consuming union-controlled arbitration-procedure, or file his own lawsuit without any guarantee of an expedited hearing on the merits.[28]

III. This Court should not review this or any other case involving the procedural-due-process merits of a proportionate-share-payment scheme until the lower courts have developed a full factual record describing how such a procedure, arguably valid in law, actually works in practice.

If *Jibson* and *Kempner* teach anything, it is the truism

Court of Appeals' denial of CTU's motion for reconsideration of the union's motion for rehearing. *See* Petition at 14.
[27] Kempner v. Local 2077, AFSCME, 126 Mich. App. 452, 460, 337 N.W.2d 354, 358 (1983), *citing* White Cloud, 101 Mich. App. 309, 300 N.W.2d 551 (1980).
[28] *Compare and contrast* White Cloud, 101 Mich. App. at 318-19, 300 N.W.2d at 555.

that constitutional questions are not ripe for adjudication absent development of a full factual record. Those cases came to this Court presenting naked questions of law, without factual records describing how the procedural schemes there involved actually worked. In as much as the schemes in *Jibson* and *Kempner* were arguably valid in law (depending on the precise facts of their operations and applications), but had not been tested in the crucible of real-world practice, dismissal of the appeals most logically indicated their prematurity.

This case is equally unripe for plenary review, for two reasons. First, CTU's original proportionate-share-payment scheme is not even arguably valid in law, but instead constitutes a procedure without the barest semblance of due process. To issue a writ of certiorari to affirm the Court of Appeals' decision on this point would be a waste of this Court's time. Second, if and when CTU and the Board do develop a plan that on its face meets the minimum requirements of procedural due process, investigation of the plan's operation and effect in practice will still be necessary—to determine whether or not the plan's provisions for the traditional due-process elements of notice, hearing, and judicial review satisfy the fundamental constitutional standard of procedural "meaningfulness". For this Court to issue a writ of certiorari now to state in purely abstract terms the need for CTU at some later date to guarantee these elements in a "meaningful" way would amount at best to an academic exercise.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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24 April 1985

No. 84-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, and ROBERT M. HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, and GLENDIS HAMBRICK, INDIVIDUALLY AND AS OFFICERS OF THE CHICAGO TEACHERS UNION,

Petitioners,

v.

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHERLENE HOLMES, EDNA ROSE MCCOY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In our petition, we urged the Court to vacate the judgment of the court of appeals and to remand this case for reconsideration in light of the subsequent summary decisions in *Jibson v. White Cloud Education Ass'n*, —— U.S. ——, 105 S.Ct. 236 (1984), and *Kempner v. Dearborn Local 2077*, —— U.S. ——, 105 S.Ct. 316 (1984), both of which sustained the constitutionality of procedures for effecting proportionate share payments which procedures were *less exacting* than those mandated by the court below. Respondents seek to wish away *Jibson* and *Kempner* in all the following ways. Respondents contend that remanding this case in light of those intervening precedents "would manifestly waste judicial resources" because, according to respondents, if this case were remanded, "the Court of Appeals would simply distinguish *Jibson* and *Kempner* on one or more of many alternative grounds, and then reinstate its earlier opinion." Resp. Br. at 10. The appellate court would do so, respondents maintain, because "whatever this Court's reasons for summarily dismissing *Jibson* and *Kempner*, they could not have been the reasons [petitioners] advance unless this Court meant by those dismissals *sub silentio* also to overrule both *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)] and *Ellis* [*v. BRAC*, —— U.S. ——, 104 S.Ct. 1883 (1984)], and "no sensible Court of Appeals would hold that the mere summary dismissals in *Jibson* and *Kempner* have radically transmogrified the legal principles this Court so painstakingly explained and applied in its plenary decisions in *Abood* and *Ellis*." Resp. Br. at 9-10. As we proceed to show, respondents' evasions cannot withstand scrutiny.

First, there is no mystery, nor even any room for doubt, as to the holding of *Jibson* and *Kempner*. In both cases the unions, to borrow the rhetoric respondents employ in their statement of the case here, "unilaterally informed the Board [of Education] of the amount of the payments demanded [from employees whom the union

represented but who had not joined the union]." In both cases "the Board deducted the proportionate-share payments, and transferred the monies to [the union], without even attempting to verify the propriety of its actions." In both cases, individuals who wished to challenge the amount of the required payments were obligated to "either avail [them]selves of [the] 'internal union review' and arbitration scheme . . . or sue [the union]." Resp. Br. at 3-4. In both cases, objecting fee payers challenged these procedures, and the state courts rejected the challenges. In both cases the objectors appealed to this Court raising the question whether the procedure was unconstitutional because it "licenses the unions—prior to any adjudication of the amount of a constitutionally permissible agency shop fee—to spend a dissenting employee's compulsory fee." *See* CTU Pet. for Cert. at 10, 12 (quoting *Jibson* and *Kempner* jurisdictional statements). And in both cases this Court dismissed the appeals for want of a substantial federal question.

In sum, *Jibson* and *Kempner* necessarily establish, contrary to the holding below, that the Constitution permits a union to collect and expend proportionate-share payments from objecting fee payers prior to a state adjudication as to the proper amount of the payment, at least where, as was true in *Jibson* and *Kempner*, the union in determining the amount of the fee makes a reduction of dues based on a "good faith application of current case law." While respondents accuse us of offering a "self-interested interpretation of the questions presented in the appeal[s]," in *Jibson* and *Kempner*, Resp. Br. at 10, our "interpretation" of those decisions is based upon the text of the opinions of the Michigan courts in those cases and the text of the questions presented by the appellants' jurisdictional statements, all of which we quoted in our petition. Respondents, in contrast, conveniently ignore all these source materials.

Second, respondents are wrong in suggesting that *Abood* and *Ellis* require a different reading of *Jibson*

and *Kempner* (even assuming, *arguendo*, that the latter cases were susceptible of some alternative interpretation). To the contrary, *Abood* did not reach the precise procedural due process question at issue here, as even the court below acknowledged, *see* Pet. App. at A-8. And *Ellis*, which did reach that question albeit in a different context, supports the results later reached in *Jibson* and *Kempner*.

In *Ellis* objecting fee payers were required to pay up-front to the union the same amount as union members paid in dues; the union later rebated to the objectors the portion of their payments attributable to activities which the objectors could not be compelled to support. The Court held that this "pure rebate approach is inadequate." 104 S.Ct. at 1890. But the *Ellis* Court based its rejection of that approach on the very fact that there are "readily available alternatives, such as advanced reduction of dues and/or interest-bearing escrow accounts [into which some or all of an objector's payments are deposited *pendente lite*]." *Id.* The Court explained that in light of the "*acceptable alternatives*," the pure rebate approach was impermissible. *Id.* (emphasis added).

Ellis thus supports the precise procedure the court below invalidated which includes *both* an advanced reduction and an escrow. *See* Pet. App. A-1, A-51. Plainly, neither *Abood* nor *Ellis* provide any basis for doubting what is in any event clear from *Jibson* and *Kempner*: that the latter cases hold that under the Constitution an objector may be required to make proportionate share payments of a reduced amount of dues before a final adjudication is rendered with respect to the objector's challenge to the amount of the reduction.[1]

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[1] Respondents suggest that this rule is somehow inconsistent with due process principles; the fallacy of that suggestion is revealed by the fact that respondents have not cited even a single due process decision to support their version of the Due Process Clause. *See also* Pet. at 17-21.

Third, respondents err in suggesting that there is any principled basis for distinguishing *Jibson* and *Kempner* from the instant case. Respondents suggest that *Jibson* is distinguishable because there "the employee could 'immediately file suit for declaratory judgment' " and could " 'quickly move for a resolution of the issue and a vindication of his constitutional rights,' " Resp. Br. at 11, *quoting White Cloud Education Association v. Board of Education*, 101 Mich. App. 309, 300 N.W. 2d 551, 555 (1980), whereas here, according to respondents, there is not "any guarantee of an expedited hearing on the merits." But Illinois, too, has a declaratory judgment procedure, Ill. Rev. Stat., Chap. 110, § 2-701 (1983), and there is no reason to assume that the Illinois courts would be dilatory in adjudicating constitutional challenges brought by objecting fee payers.[2] And the *Jibson* court in any event did not "*guarantee*" expedition; all that the court there said was that the objetcors could "*move*" for expedition. Thus respondents offer no distinction of *Jibson* at all.

Respondents' effort to brush *Kempner* aside is equally superficial. Respondents say that "the internal union exhaustion-requirement upheld in that case was imposed as a prerequisite to the filing of an administrative complaint by a dissenting employee, not as a bar to judicial relief." Resp. Br. 10. But respondents do not even offer a theory as to why an exhaustion requirement is consistent with due process in one instance and not the other.

Fourth and finally, insofar as respondents suggest that, on remand, *Jibson* and *Kempner* would be less than fully binding on the appellate court, respondents are mistaken. Although this Court has held that in applying the rule of *stare decisis* the Court itself will feel freer to overrule summary decisions than plenary decisions, the Court also has made it clear that, unless and until a summary decision is overturned by this Court, the summary decision constitutes the law and is binding on the lower courts just as much as an opinion rendered after plenary consideration. *See, e.g., Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). *Jibson* and *Kempner* thus constitute the law that must be applied by the lower courts. And because the court of appeals in this case has not had the opportunity to consider the impact of those decisions, this case should be remanded to the Seventh Circuit for reconsideration.

[2] Such an assumption would be especially unwarranted here since respondents elected not to tender their claims to the Illinois courts for resolution.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Court should issue a writ of certiorari in this case.

Respectfully submitted,

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No. 84-1503

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHERLENE HOLMES, EDNA ROSE MCCOY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD

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23 September 1985

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Does a governmental agency deprive its nonunion public employees of procedural due process of law where, pursuant to an agreement between it and the union acting as the employees' exclusive representative, it:

(i) garnishes their wages in satisfaction of the union's unproven claim that those garnishments represent proper payments for the union's "collective-bargaining" services to the employees; and

(ii) immediately transfers the garnishments to the union, knowing that the union will require the employees to pursue its internal scheme of arbitration, or prosecute an independent civil action in state court, to recover any part of the disputed monies?

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BRIEF FOR RESPONDENTS ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHERLENE HOLMES, EDNA ROSE MCCOY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD

Respondents Annie Lee Hudson, K. Celeste Campbell, Estherlene Holmes, Edna Rose McCoy, Dr. Debra Ann Petitan, Walter A. Sherrill, and Beverly F. Underwood submit this brief in opposition to the brief filed on behalf of petitioners Chicago Teachers Union, Local No. 1, *et alia*, and of the Board of Education of the City of Chicago and other respondents supporting petitioners.[1] Because of the parties' peculiar alignments, this brief will designate respondents Annie Lee Hudson, *et alia*, as "the teachers", petitioners collectively as "CTU", and respondents supporting petitioners collectively as "the Board".

[1] *See* Brief for the Chicago Teachers Union, Local No. 1, et al., Petitioners, and for the Board of Education of the City of Chicago, et al., Respondents Supporting Petitioners ("CTU/Bd Br."), at 1-2 & n.1.

COUNTERSTATEMENT OF THE FACTS

The teachers accept the Board's and CTU's statement of the facts, with three exceptions. First, the record contains no proof that, "[d]uring the period 1967 through November, 1982", or at any time thereafter, "every employee in the bargaining unit", including the teachers, "received all the benefits of the CTU-Board of Education collective bargaining agreement and its administration by [CTU]".[2] Neither does the record establish that any supposed "benefits" the "collective bargaining agreement and its administration" actually conferred on some or all "employees in the bargaining unit" were such *constitutionally sanctioned* "collective-bargaining benefits" as might support imposition of a "proportionate-share payment" on nonunion employees under the *Abood* doctrine.[3]

Second, contrary to the Board's and CTU's implication, the District Court's statement that CTU "carefully documented its calculation of the fair share fee" constitutes no finding that that "calculation" determined a constitutionally permissible "fee", merely the observation that CTU explained how arithmetically it arrived at the "fee" it claimed.[4] Because CTU's method for calculating the "fee" was constitutionally improper, its supposed "car[e]" in "document[ing] its calculation" proves nothing.[5]

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[2] *Pace id.* at 3.

[3] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Under the former Illinois law at issue here, a "proportionate-share payment" was analogous to the Michigan "agency fee" at issue in *Abood*, and to the "fair-share fees" other States' public-employment labor-relations acts impose. The present Illinois law designates these charges "fair-share fees". *See* CTU/Bd Br. at 3 & n.2.

[4] *Pace* CTU/Bd Br. at 4.

[5] *Post*, pp. 27-29, 36-38. Moreover, in as much as the Board and CTU integrated the latter's "calculation" within a fatally unconstitutional wage-garnishment procedure, the "calculation's" substantive demerits are irrelevant.

Third, the Board and CTU wrongly suggest that five teachers are entitled to no relief because "[t]he district court concluded that * * * they had not protested the fee to CTU", "[t]he court of appeals did not disturb the district court's ruling in this regard", and "these five have not cross-petitioned to seek review of that ruling".[6] The Court of Appeals held that "[n]one of the [teachers] followed the prescribed [CTU] procedure through to the end (some did not invoke it at all), *but that is unimportant if the procedure violates their constitutional rights*"[7]—which, of course, the Court of Appeals found. Moreover, as this Court held in an analogous context, complainants such as the teachers may present their *first* "protest" of a union's claim for a "proportionate-share payment" in a court complaint.[8]

SUMMARY OF THE ARGUMENT

Contrary to the miscnaracterization of the Board and CTU, the issue here is what procedures the Due Process Clause of the Fourteenth Amendment requires for initial validation and collection of "proportionate-share payments" from the teachers, even if the ultimate judicial determination is that those payments satisfy the substantive requirements of the First Amendment as proper compensation for CTU's "collective-bargaining" activities on the teachers' behalf. Indeed, far from framing a First-Amendment issue, the facts present the paradigmatic procedural-due-process situation, in which an alleged private creditor (CTU) invokes the power of a governmental agency (the Board) to seize property (the unrestricted possession and use of wages) from alleged private debtors (the teachers) under color of an untested claim of right arising from the creditor's supposed provision of services

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[6] CTU/Bd Br. at 6 n.6.

[7] Hudson v. Local No. 1, CTU, 743 F.2d 1187, 1194 (7th Cir. 1984) (emphasis supplied).

[8] BRAC v. Allen, 373 U.S. 113, 119 n.6 (1963).

to the debtors.

In this context, the applicable precedents are not *Abood*, *Ellis*, or this Court's related decisions dealing with the substantive First-Amendment aspects of "proportionate-share-payment" schemes,[9] but instead this Court's long line of procedural-due-process opinions, stretching from *Sniadach* through *Hudson* v. *Palmer*.[10] And, applied here, the latter decisions compel the conclusion that the wage-garnishment scheme the Board and CTU have implemented violates the Due Process Clause because:

1. No extraordinary governmental interest requires *pre*-hearing seizure of the teachers' wages.

2. No competent administrative or judicial official evaluates the need for *pre*-hearing seizures, or scrutinizes the validity of CTU's claims.

3. No statute or regulation requires CTU to establish even the probable validity of its claims prior to seizure of the wages.

4. State law does not mandate an early administrative or judicial hearing on the propriety of the seizures.

5. No safeguards prevent CTU's abuse of the "proportionate-share system" for its own private gain.

6. CTU has no perfected *pre*-seizure legal interest in the wages, only an abstract claim to some indeterminate portion of them.

7. What constitutes CTU's "collective-bargaining" expenses is a complex question of fact and law.

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[9] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. BRAC, ___ U.S. ___, 104 S. Ct. 1883 (1984); and cases cited therein.

[10] Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Hudson v. Palmer, ___ U.S. ___, 104 S. Ct. 3194 (1984). The teachers catalogue and apply these decisions *post*, pp. 14-26.

8. The teachers lack access to the evidence that supports, or confutes, CTU's claims.

9. No neutral government official immediately reviews the amount of the seizures.

10. State law provides no damages or attorneys' fees in the event of wrongful seizures. And,

11. The seizures occur pursuant to an established state procedure, under circumstances in which the government could, but does not, provide adequate *pre*-deprivation process, instead relegating the teachers to a *post*-deprivation state-court civil action.

For these reasons, the Court of Appeals correctly condemned the "proportionate-share-payment" scheme as violating procedural due process.

ARGUMENT

I. Contrary to the Board's and CTU's mischaracterization, the issue in this case is, not what substantive limitations the First Amendment imposes on CTU's ultimate use of "proportionate-share payments", but rather what procedural protections the Due Process Clause of the Fourteenth Amendment requires in the validation of those payments prior to the Board's seizure of them.

The Board and CTU disingenuously argue that the teachers and the Court of Appeals have attempted effectively to reverse the substantive First-Amendment doctrine this Court enunciated in *Abood* and related decisions. Nothing could be less true. Both the teachers and the Court of Appeals accepted the substantive teaching of *Abood* that a State may require nonunion public employees to reimburse their exclusive collective-bargaining representative for services it renders to them in that capacity, without abridging their First-Amendment rights. What the teachers challenged and the Court of Appeals held unconstitutional under the Due Process Clause of the

Fourteenth Amendment is *the procedure* the Board and CTU jointly implemented to collect "proportionate-share payments".

Neither the teachers nor the Court of Appeals denied that CTU may be entitled to some "proportionate-share payments". But the teachers did (and here continue to) deny (with the Court of Appeals' support) that, whatever the size of these payments may prove to be, the Board may constitutionally collect them by mechanically garnishing the teachers' wages at CTU's unilateral demand and straightaway transferring the monies to CTU without a prior hearing before a governmental body on the merits of CTU's claim and the teachers' defenses.

Thus, the issue here is what procedures the Fourteenth Amendment requires for initial validation and collection of a "proportionate-share payment", even where a court ultimately concludes that that payment substantively satisfies the First Amendment. And the studied mischaracterization of the issue by the Board and CTU strikingly illuminates their inability coherently to defend the conduct the teachers challenged and the Court of Appeals ruled unconstitutional.

A. Because the arrangement for "proportionate-share payments" amounts to a scheme for garnishment by the government (the Board) of the wages of alleged debtors (the teachers) at the unilateral demand of an alleged creditor (CTU), and immediate transfer of those monies to the latter without a prior hearing on the merits of either its claims or the teachers' defenses, the arrangement raises serious procedural-due-process questions, even if CTU could ultimately establish its right to the monies in their entirety.

Operationally, this case involves the archtypical procedural-due-process situation, wherein an alleged private creditor invokes state power to seize property from an

alleged private debtor under color of some untested claim of right arising from the creditor's supposed provision of services or tangible goods to the debtor.

Under color of Illinois law,[11] in their collective-bargaining agreement the Board (a governmental agency) and CTU (an alleged private creditor) agreed to impose on the teachers (alleged private debtors) definite monetary liabilities ("proportionate-share payments") to compensate CTU for services it claimed it had rendered or would render as the teachers' exclusive representative. The Board and CTU also agreed to collect this alleged debt by having the Board mechanically garnish the teachers' wages and transfer the monies directly to CTU, without any governmental investigation of the merits of CTU's claims or the teachers' defenses. As a matter of its own discretion, and long after this litigation began, CTU then segregated the payments in what it labelled an "escrow" account, pending either: (i) the teachers' submission of their objections to CTU's hand-picked arbitrator, with whatever subsequent judicial review of his decision Illinois law might allow; or (ii) the teachers' initiation of an independent state-court civil action sounding in tort.[12]

In so far as this case differs from the paradigmatic procedural-due-process situation, its differences exacerbate the problems involved. First, the constitutionally proper "proportionate-share payments" due CTU from the teachers are unknown. In the typical debtor-creditor case, the debt is both fixed and known, either because the debtor voluntarily contracts it with the creditor, as evidenced by a promissory note, a conditional-sales agree-

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[11] Or, as the Board and CTU say, "paralleling the Illinois law". CTU/Bd Br. at 4.

[12] As the Board and CTU admit, CTU "began voluntarily placing in escrow the [teachers'] proportionate share payments" only just "[b]efore the case reached the court of appeals", and only then "amended its procedure for collecting proportionate share payments to include an escrow provision". CTU/Bd Br. at 7.

ment, or some similar instrument; or because the debtor willingly accepts tangible goods or services from the creditor, as evidenced by readings on a gas or electric utility-meter, or some similar objective measure. Here, distinguishably, although Illinois statute purported to set the "proportionate-share payments",[13] the teachers' lawful indebtedness depends on two unknowns: (i) what alleged "services" CTU provided as the teachers' exclusive representative; and (ii) whether these "services" satisfy the First Amendment as "collective-bargaining" activities.[14] Thus, CTU has only an *abstract and inchoate* statutory claim to "proportionate-share payments", for the perfection of which in the face of the teachers' challenge it bears the burden of proving—but has yet to prove—what specific "services" it provided as their exclusive representative, whether these "services" satisfied the constitutional "collective-bargaining" standard, what the costs of the "services" were, and what constituted a proper allocation of their costs to individual employees.[15]

Second, because the constitutionally proper "proportionate-share payments" are unknown, the weight of CTU's alleged property-interest in the teachers' wages is indeterminate. In the typical debtor-creditor case, the property subject to seizure (be it money loaned, an apartment rented, or some consumer good furnished) was originally the creditor's undisputed, unencumbered property. The debtor obtained possession and use of it only conditionally, by agreeing to pay principal and interest, rent, or installments. Invoking state power to seize the property from the debtor, the creditor asserts a failure of the condition upon which the debtor's possession depends and a pre-existent right of reversion of possession to the creditor (or a right of the government to hold the property *pendente lite* on his behalf). And the key fact justifying seizure is that the debtor has violated the conditions of continued possession as against the original owner. Here, distinguishably, the wages the Board garnished indisputably were earned by and initially belonged exclusively to the teachers. Illinois law licensed the Board and CTU formally to encumber these wages through the Board's agreement with CTU's unilateral claim to "proportionate-share payments". But the maturation of this claim sufficient to justify the conclusion that CTU has a property-interest substantial enough to support governmental seizure of a determinate part of the wages depends upon CTU's satisfaction of the necessary evidentiary conditions precedent as to the identities of the "services" it provided, their "collective-bargaining" character, their costs, and so on. Absent such evidence, the weight of CTU's entitlement is conjectural, even spectral; whereas, the weight of the teachers' entitlement to what their own labor has earned is clear.

Third and last, although how CTU intends to spend the "proportionate-share payments" determines the constitutionality of its entitlement to them, the propriety of that use is irrelevant to the teachers' right to procedural due process in the initial seizure. In the typical debtor-creditor case, *ceteris paribus* the use the creditor makes of the

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[13] The definitions of allowable "proportionate-share" or "fair share" payments are patently defective in both the original and the amended Illinois laws. The former "measured" a "proportionate-share payment" by "the amount of dues uniformly required by [*sic*, no doubt 'of' was intended] members [of the exclusive representative]". Ill. Rev. Stat., ch. 122, § 10-22.40(a) (1983). Under the latter, a "fair-share fee" must neither "exceed the dues uniformly required of members [of the exclusive representative]" nor "include any fees for contributions related to the election or support of any candidate for political office". Ill. Stat. Ann., ch. 48, ¶ 1711 (Smith-Hurd 1984 Supp.). Yet, although rare cases may satisfy these criteria, generally (as is judicially noticeable) unions do *not* expend *all* of their dues-incomes, or all of those incomes less only their "contributions related to the election or support of * * * candidate[s] for political office", on activities properly categorizable as "collective bargaining" in a labor-relations, let alone the constitutional, sense. *See, e.g.*, Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 753-54 & n.6 (1963).

[14] *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), *with* Ellis v. BRAC, ___ U.S. ___, 104 S. Ct. 1883 (1984).

[15] CTU has never disclosed whatever proofs it may have concerning these matters. *See ante*, p. 2, and *post*, pp. 27-29.

property seized from the debtor is irrelevant; for the property in dispute was originally the creditor's to employ as he willed, and came into and could remain in the debtor's possession only upon his fulfillment of the creditor's conditions. Here, distinguishably, CTU is entitled to "proportionate-share payments" only if it spends those monies on constitutional "collective-bargaining" activities it performs as the teachers' exclusive representative. Thus, CTU's intended use of the monies is material to the size of the debt. Yet, even if CTU could ultimately show that this use were entirely "collective-bargaining" in character, the teachers would nevertheless be entitled to the same measure of procedural due process obtaining in the typical debtor-creditor situation where use is not a substantive issue.[16]

In sum, operationally this case presents the paradigmatic debtor-creditor-government procedural-due-process situation, aggravated from the debtors' (the teachers') perspective by the indeterminacy of the alleged debt, the speculative weight of the creditor's (CTU's) interest, and the absence of proof as to CTU's actual expenditures.

B. The Board's and CTU's studied mischaracterization of this case as involving the legitimacy of CTU's ultimate use of "proportionate-share payments", rather than the propriety of the procedures the government employs for establishing the validity of those payments prior to seizing or transferring them to CTU, exposes the Board's and CTU's impotence to defend the wage-garnishment scheme against procedural-due-process attack.

The compelling obviousness of the procedural-due-process issue before this Court exposes the Board's and CTU's brief as a coldly calculated study in misrepresentation designed to cloak their inability to muster even a colorable defense for their wage-garnishment scheme.

[16] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978) (property-owner has "absolute" right to procedural due process, even if he suffers no "other actual injury" than loss of the property and that loss is "justified").

Admitting that "the question posed here is one of constitutional *procedure*", the Board and CTU then sidestep that issue: first, by pretending that "to answer [the latter] question it is necessary first to understand the *substantive* constitutional rights that are implicated"; and then by claiming that, because the teachers' supposedly sole constitutional complaint is against CTU's impermissible *use* of the "proportionate-share payments", and because CTU as a matter of grace has chosen to "escrow" those payments pending the outcome of some judicial hearing the teachers must initiate in the future, therefore the Board's *pre*-hearing garnishment of their wages and transfer of the monies to CTU is constitutionally faultless.[17] Thus, the Board and CTU contend, "the collection of proportionate share payments from [the teachers] does not, in and of itself, raise constitutional questions"—supposedly because the "application" of "the procedural component of the Due Process Clause * * * is triggered by the existence of the objector's First Amendment right to be free from providing 'compulsory subsidization of ideological activity'", which right CTU's "escrow" supposedly protects from abridgment.[18]

In essence, as far as the teachers' wages are concerned, the Board and CTU simply excise from the Fourteenth Amendment the never-before-questioned principle that a State may not deprive any person of the possession, use, or ownership of property without due process of law, no matter how the recipient of that property intends to use it. For, according to them: (i) if some court eventually finds

[17] CTU/Bd Br. at 8-10 (emphasis supplied).

[18] *Id.* at 16-17. In a footnote, they go even further to assert that, "[b]ecause the Board of Education's only involvement in the proportionate-share payment system is to participate in the collection of those payments which, in and of itself, does not raise a constitutional issue, the claim against the Board is of the most attenuated kind". *Id.* at 16 n.10.

CTU entitled to *any part* of the garnished wages to recompense it for "collective-bargaining" activities, then as to *all* of the garnishments "the collection does not * * * raise constitutional questions"; (ii) even if the court finds CTU entitled to *no part* of the seized wages, nevertheless the constitutionality of "the collection" is still faultless; and, indeed, (iii) the teachers may not even complain of any procedure the Board and CTU employ to siphon off any (or perhaps even all) of the teachers' wages to subsidize *any* expenditure of CTU on "non-political, non-ideological activity"![19]

Not surprisingly, the Board and CTU support their extraordinary thesis with not a single procedural-due-process decision of this Court that sanctions, or that they even claim sanctions, a seizure of property similar to that in issue here. Rather, they leap from the holdings of *Abood*, *Ellis*, and earlier related cases—that the First and Fourteenth Amendments *impose substantive limitations*

[19] *See id.* at 15 n.9, where they attempt to turn *Abood* and *Ellis* upside-down. These cases held that compelling nonunion employees to pay "fair-share fees" is constitutional because of the governmental interest in supporting "collective bargaining", notwithstanding the ideological nature of such bargaining; whereas, the use of such fees to subsidize other, non-bargaining ideological activities (such as political campaigns) is unconstitutional. The results in *Abood* and *Ellis* turned on the "collective-bargaining" nature of the activities subsidized, not on their non-ideological character. The Board and CTU, however, misinterpret these decisions as teaching that dissenters may be compelled to subsidize *any* union activity, *even if it has no rational relation to "collective bargaining"*, so long as it is "non-political" or "non-ideological". Thus, according to them, the Board could agree with CTU to pay the teachers' wages directly to CTU's officials, for such "non-political, non-ideological" activity as vacationing in the Caribbean, shopping at Tiffany's, or dining at Jean Pierre of Watergate! Their error is patent: The governmental interest that this Court says justifies forced payment of "fair-share fees" is *not* an interest in defraying the expenses of unions *simpliciter*, even if those expenses be "non-political" or "non-ideological", but only an interest in reimbursing unions for demonstrably *"collective-bargaining" services* they actually provide in their capacities as employees' exclusive representatives. This Court has never held that any other interest subtends assessments of "fair-share fees".

on the uses of monies unions may compel dissenting employees to pay under color of "fair-share-fee" arrangements—to the amazing conclusion that therefore the Due Process Clause *permits procedural license* in "the collection" of such monies. Where any opinion written in those cases, or any brief the various parties submitted, decides, addresses, or even raises a procedural-due-process issue they do not say—because, of course, they can not. For *Abood*, *Ellis*, and the other cases dealt solely with challenges to certain of the unions' *expenditures* of dissenting employees' "fair-share" monies, not to the *procedures for collecting* those monies. For example, the language in *Ellis* concerning "advance reduction of dues and/or interest-bearing escrow accounts" on which the Board and CTU disingenuously focus refers to judicial remedies designed to prevent a union from imposing *substantive* harm on objecting employees by "commit[ting] dissenters' funds to improper uses even temporarily".[20] Nothing in *Ellis* sanctions CTU's, or any, "advance reduction of dues" or "interest-bearing escrow accoun[t]" as within the *procedural-due-process* strictures of the Fourteenth Amendment—if only for the simple reason that neither of these alternatives addresses the key procedural-due-process question of whether a hearing should proceed, or may follow, seizure of disputed property.[21]

The old adage counsels, "If you can't win on the law, argue the facts; if you can't win on the facts, argue the law!" Unable to prevail on either the law or the facts of this case, the Board and CTU have decided to argue an imaginary case, to which this Court's leading procedural-due-process decisions are irrelevant. Such a devious course may spare them the embarrassment of frankly con-

[20] Ellis, ____U.S. at ____, 104 S. Ct. at 1890, *quoted in* CTU/Bd Br. at 19. *See also* IAM v. Street, 367 U.S. 740, 771 (1961) (emphasis supplied): "Restraining the collection of all funds from [the exclusive representatives] sweeps too broadly, since [the employees'] objection is *only* to the *uses* to which *some* of their money is put."

[21] *See post*, pp. 14-26.

ceding what they cannot disprove: namely, the procedural invalidity of their wage-garnishment scheme. But even *sotto voce* it unmistakably bespeaks the bankruptcy of their position.

II. Application of the procedural-due-process principles in this Court's decisions from *Sniadach* v. *Family Finance Corporation* through *Hudson* v. *Palmer* condemns the instant arrangement for collecting "proportionate-share payments" as patently unconstitutional.

Although the Board and CTU remain suspiciously reticent about the procedural-due-process principles applicable here, this Court's precedents loudly and consistently condemn as unconstitutional every aspect of the challenged wage-garnishment scheme.

A. Absent extraordinary circumstances, the government denies an alleged debtor due process of law if, pursuant to an established state procedure, it deprives him of the use of property by seizing that property at the unilateral and unsubstantiated demand of an alleged creditor.

Contrary to the Board's and CTU's pretense that the "application" of procedural-due-process considerations must be "triggered by the existence of the objector's First Amendment right to be free from providing 'compulsory subsidization of ideological activity'", this Court has repeatedly applied the Due Process Clause to seizures of property wholly unrelated to First-Amendment freedoms, but which parallel the wage-garnishment scheme involved here.[22]

"Minimum procedural safeguards", this Court has reiterated, include "notice detailing the reasons for a proposed [deprivation of property]"[23] and a *pre*-deprivation hearing.[24] These requirements do not depend on the property constituting "absolute 'necessities' of life",[25] and are not diluted because the property-holder's right arises from state law,[26] because the ownership of the property is disputed,[27] because the property-holder's interest in possession and use is arguably not "weighty",[28] because the property-holder cannot show that he "will surely prevail at [a] hearing",[29] or even because he suffers no "actual injury" other than the dispossession itself.[30] Indeed, this Court "ha[s] described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he be deprived of any significant property interest'".[31]

To be sure, this Court has countenanced some *pre*-hearing seizures of property—but, in those "extraordinary", "truly unusual", and "limited" instances, the seizures were "directly necessary to secure an important governmental or general public interest"; there was "a special need for very prompt action"; and "the State has

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[22] *Pace* CTU/Bd Br. at 16-17.

[23] Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970).

[24] Fuentes v. Shevin, 407 U.S. 67, 88-89 (1972) (citing numerous cases).

[25] *Id.* at 88-90, *cited with approval in* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 (1975). *Accord*, Mathews v. Eldridge, 424 U.S. 319, 325-26 (1976), *citing* Fuentes, 407 U.S. at 88-89, *and* Bell v. Burson, 402 U.S. 535, 539 (1971).

[26] Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-32 (1982). Thus, the Board and CTU may not contend that, because the teachers' entitlements to their wages derive from Illinois law, therefore they must accept whatever procedure for "proportionate-share payments" the Illinois Legislature permits.

[27] Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 11-12 (1978), *citing* Fuentes, 407 U.S. at 86.

[28] Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). When a state law deprives a person of property, the Due Process Clause applies even though the deprivation may not be "grievous". Goss v. Lopez, 419 U.S. 565, 576 (1975).

[29] Fuentes, 407 U.S. at 87.

[30] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978).

[31] Cleveland Bd. of Educ. v. Loudermill, ___ U.S. ___, ___, 105 S. Ct. 1487, 1493 (1985) (footnote omitted; emphasis retained), *quoting* Boddie v. Connecticut, 410 U.S. 371, 379 (1971).

kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance".[32] Furthermore, in such cases, the Court "relied upon the extent to which [the governmental] interest [would] be *frustrated* by the delay necessitated by a prior hearing".[33]

Absent the "'necessity of quick action by the State or the impracticality of providing any predeprivation process'", however, this Court's decisions teach that "a post-deprivation hearing [is] constitutionally inadequate"—a teaching that is "particularly true where, as here, the State's only post-[deprivation] process comes in the form of an independent tort action".[34]

For an early example, *Sniadach* v. *Family Finance Corp.*[35] overturned a Wisconsin wage-garnishment statute. "[T]he clerk of the court issues the summons at the request of the creditor's lawyer", the Court explained;

> [a]nd it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen. They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.
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> * * * [I]n the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the * * * statute narrowly drawn to meet

[32] Fuentes, 407 U.S. at 90-91.

[33] Mackey v. Montrym, 443 U.S. 1, 25-26 (1979) (Stewart, J., dissenting) (emphasis supplied).

[34] Logan, 455 U.S. at 436 (footnote omitted).

[35] 395 U.S. 337 (1969).

> any such unusual condition.[36]

Concurring, Justice Harlan reiterated the basic rule that "due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use".[37]

Then, *Fuentes* v. *Shevin*[38] declared certain Florida and Pennsylvania replevin-statutes unconstitutional on similar grounds. "There is no requirement" in the Florida statute, the Court noted,

> that the applicant make a convincing showing before the seizure that the goods are, in fact, "wrongfully detained." Rather, Florida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession * * * and that he file a security bond * * * . On the sole basis of the complaint and bond, a writ is issued * * * .
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> Thus, at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. *After* the property has been seized, he will eventually have an opportunity for a hearing, as the defendant in the trial of the court action for repossession, which the plaintiff is required to pursue.
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> [T]he Pennsylvania law does not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property. The party

[36] *Id.* at 338-39 (footnotes omitted).

[37] *Id.* at 343 (separate opinion) (emphasis retained).

[38] 407 U.S. 67 (1972).

> seeking the writ is not obliged to initiate a court action for repossession. Indeed, he need not even formally allege that he is lawfully entitled to the property. * * * If the party who loses property * * * is to get even a post-seizure hearing, he must initiate a lawsuit himself.

Turning to the question of whether the statutes "are constitutionally defective in failing to provide for hearings 'at a meaningful time'", the Court emphasized that "neither * * * statute provides for notice or an opportunity to be heard *before* the seizure". A prior hearing, the Court explained, "minimize[s] substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party". Therefore, the Court ruled,

> the right to notice and a hearing * * * must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken * * * . Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking * * * has already occurred.

Although the statutes imposed various requirements on the creditor, the Court made clear that

> those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. * * * Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides—and does not generally take even tentative action until it has itself examined the support for the plaintiff's position. The Florida and Pennsylvania statutes do not even require the official issuing a writ of replevin to do that much.

Concluding, the Court found that the broadly drawn statutes "serve no * * * important governmental or general public interest" requiring immediate action, such as "furthering a war effort or protecting the public health". Instead, "[t]hey allow summary seizure * * * when no more than private gain is directly at stake". Moreover,

> [t]he statutes * * * abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to [seize] goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.[39]

Similarly, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* struck down a Georgia garnishment-scheme because the statute lacked the necessary "saving characteristics":

> The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. * * * The affidavit * * * need contain only conclusory allegations. The writ is issuable * * * by the court clerk, without participation by a judge. Upon service of the writ, the debtor is deprived of the use of the property * * * . There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment.[40]

Together, then, *Sniadach*, *Fuentes*, and *North Georgia Finishing* teach that a seizure of property without a prior hearing is unconstitutional where: (i) no extraordinary circumstances compel immediate action to protect a substantial governmental interest; (ii) no state official (in par-

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[39] *Id.* at 73-78, 80, 80-81, 81-82, 83, 92-93, 93 (footnotes omitted).

[40] 419 U.S. 601, 607 (1975).

ticular, a judge) participates in the decision to initiate the seizure, reviews the factual and legal bases of the creditor's claim, or evaluates the need for a *pre*-hearing seizure; (iii) no statutory provision requires the creditor to establish the probable validity of his claim, to make a convincing factual showing, or even to present some evidence beyond mere assertions, conclusory allegations, or hearsay; (iv) no mandate exists for an early hearing; and (v) no safeguards protect against abuse of the system by self-interested parties seeking private gain.

Where this Court has sustained seizures of property without a prior adversary hearing, the statutes in issue incorporated procedures within the rule of *Sniadach*, *Fuentes*, and *North Georgia Finishing*. For example, *Mitchell* v. *W.T. Grant Co.*,[41] a case antedating *North Georgia Finishing* and explicitly distinguished therein,[42] sustained a Louisiana sequestration-statute that permitted a *pre*-hearing seizure. But, as the Court noted, "the property sequestered * * * is [not] exclusively the property of the * * * debtor"; "both seller and buyer had current, real interests in the property", the former through a vendor's lien. Furthermore,

> [t]he writ * * * will not issue on the conclusory allegation of ownership or possessory rights * * * [but] "only when the nature of the claim and the amount thereof * * * and the grounds relied upon for the issuance of the writ clearly appear from specific facts" shown by a verified petition or affidavit. * * * [T]he clear showing required must be made to a judge, and the writ will issue only upon his authorization and only after the creditor seeking the writ has filed a sufficient bond.
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> * * * *
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> [T]he statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor "proves the grounds upon which the writ was issued," * * * failing which the court may * * * assess damages in favor of the debtor, including attorney's fees.[43]

[41] 416 U.S. 600 (1974).

[42] 419 U.S. at 606-07.

Concurring, Justice Powell emphasized that the statute required the creditor to "make a specific factual showing before a neutral officer or magistrate of probable cause to believe that he is entitled to the relief requested".[44] And the Court characterized the factual issues involved—such as "existence of the debt, the lien, and the delinquency"—as "ordinarily uncomplicated matters that lend themselves to documentary proof".[45] In addition, the Court catalogued how the circumstances in *Mitchell* differed materially from those in *Sniadach* and *Fuentes*.[46]

[43] 416 U.S. at 604, 605-06 (footnotes omitted).

[44] *Id.* at 625 (separate opinion). He then went on to distinguish *Fuentes* on the basis that the "statutes [in that case] * * * did not require an applicant * * * to make any factually convincing showing", and did not mandate a prompt adversary hearing with the burden of proof on the creditor. *Id.* at 625-27 & n.1.

[45] *Id.* at 609.

[46] *Id.* at 614-18 (footnotes omitted):

> In *Sniadach*, the Court * * * observed that garnishment was subject to abuse of creditors without valid claims, a risk minimized by the nature of the security interest here at stake and the protections to the debtor offered by Louisiana procedure. Nor was it apparent in *Sniadach* with what speed the debtor could challenge the validity of the garnishment, and obviously the creditor's claim could not rest on the danger of destruction of wages, the property seized, since their availability to satisfy the debt remained within the power of the debtor who could simply leave his job. The suing creditor in *Sniadach* had no prior interest in the property attached * * *.
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> The Florida law * * * in *Fuentes* authorized repossession of the sold goods without judicial order, approval, or participation. A writ of replevin * * * was issued by the court clerk. As the Florida law was perceived by the Court, "[t]here is no requirement that the applicant make a convincing showing before the seizure," * * * the law required only "the bare assertion of the party seeking the writ that he is entitled to one" as a condition to the clerk's issuance of the writ. * * * The Pennsyl-

More recently, *Mathews* v. *Eldridge* held that a hearing was not constitutionally required prior to the termination of certain governmental benefits because of the "fairness and reliability of the existing pretermination procedures".[47] Describing how "a medical assessment * * * is required", the Court noted that "[t]his is a * * * sharply focused and easily documented decision", not involving "a wide variety of information [that] may be deemed relevant" or "issues of witness credibility and veracity [that] often are critical to the decisionmaking process". Rather, "the decision * * * will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists'". Moreover, a "detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the * * * decision". And "[a] further safeguard against mistake is the policy of allowing the * * * recipient's representative full access to all information relied upon by the state agency".[48]

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vania law was considered to be essentially the same * * * except that it did "not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property." * * * The party seeking the writ was not obliged to initiate a court action * * * .

The Louisiana sequestration statute * * * mandates a considerably different procedure. * * * [B]are conclusory claims of ownership or lien will not suffice under the Louisiana statute. * * * [T]he requisite showing must be made to a judge, and judicial authorization obtained. * * * The Louisiana law provides for judicial control of the process from beginning to end. This control * * * is buttressed by the provision that should the writ be dissolved there are "damages for the wrongful issuance of a writ" and for attorney's fees * * * .

* * * In Louisiana, * * * the facts relevant to obtaining a writ of sequestration are narrowly confined. * * * [D]ocumentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default. There is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing which will be immediately available in any event.

[47] 424 U.S. 319, 343 (1976).

[48] *Id.* at 343-44, 345, 345-46.

Finally, *Mackey* v. *Montrym* held that, "when prompt postdeprivation review is available for correction of administrative error", "predeprivation procedures" need only "be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be".[49] The "predeprivation procedures" were "reasonably reliable" in the Court's view because they involved "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him"; "the risk of erroneous observation or deliberate misrepresentation of the facts by the reporting officer in the ordinary case seem[ed] small"; and "there will rarely be any genuine dispute as to the * * * facts". Moreover, the aggrieved individual could receive "immediat[e]" "independent review * * * by a detached public officer", which "should suffice in the ordinary case to minimize the only type of error that could be corrected by something less than [a full] evidentiary hearing".[50]

In sum, rather than questioning or qualifying the rule of *Sniadach*, *Fuentes*, and *North Georgia Finishing*, *Mitchell*, *Mathews*, and *Mackey* re-affirm and re-emphasize the due-process criteria of the former opinions. Furthermore, *Mitchell*, *Mathews*, and *Mackey* teach that, given the circumstances of *Sniadach*, *Fuentes*, and *North Georgia Finishing*, a seizure of property without a prior hearing is even more compellingly unconstitutional where: (vi) the creditor has no current legal interest in the property seized; (vii) the necessary proofs involve a variety of complex matters, with possibly critical reliance on the credibility and veracity of witnesses, rather than resting on objective facts within the knowledge of a governmental official; (viii) the party whose property is seized lacks reasonable access to the evidence; (ix) there is no immediate, independent review of the seizure by a detached public offi-

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[49] 443 U.S. 1, 13 (1979).

[50] *Id.* at 13-16.

cial; and (x) the applicable statute denies awards of damages or attorneys' fees in the case of a wrongful seizure.[51]

Especially important here is that in every decision from *Sniadach* through *Mackey* this Court *never* held that a governmental deprivation of property satisfies the Due Process Clause without some reasonably reliable *pre*-deprivation fact-finding procedure in which a neutral *governmental* official plays a key investigatory and decision-making role. Moreover, in *Sniadach*, *Fuentes*, and *North Georgia Finishing*, the Court explicitly rejected the notion that the property-owners' supposed rights to *post*-seizure judicial hearings are relevant to the due-process issue.[52]

Where this Court has upheld the procedural-due-process sufficiency of a *post*-deprivation judicial remedy, as in *Parratt* v. *Taylor*, "the loss [was] not a result of some established state procedure"; the loss was "beyond the control of the State"; and "it [was] not only impracticable, but impossible, [for the State] to provide a meaningful hearing before the deprivation".[53] Holding that a *post*-deprivation judicial hearing sufficed as a remedy for a state official's negligent deprivation of an individual's property, the *Parratt* Court explained that,

> [a]lthough [the complainant] has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedures. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing.[54]

[51] Criteria (i) through (v) appear *ante*, pp. 19-20.

[52] *See* Sniadach, 395 U.S. at 338-39 (opinion of the Court), 343 (Harlan, J., concurring); Fuentes, 407 U.S. at 73-78, 80-84; North Georgia Finishing, Inc., 419 U.S. at 606-08.

[53] 451 U.S. 527, 541 (1981).

Concurring, Justice Blackmun emphasized that

> when it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so. * * * In the majority of such cases, the failure to provide adequate process prior to inflicting the harm would violate the Due Process Clause. The mere availability of a subsequent tort remedy before tribunals of the same authority that * * * deliberately inflicted the harm * * * might well not provide * * * due process * * * .[55]

Then, in *Logan* v. *Zimmerman Brush Co.*, the Court cited numerous precedents for the proposition that,

> absent "the necessity of quick action by the State or the impracticality of providing any predeprivation process," a post-deprivation hearing * * * would be constitutionally inadequate. * * * That is particularly true where * * * the State's only post-[deprivation] process comes in the form of an independent tort action.[56]

And most recently, *Hudson* v. *Palmer*[57] re-affirmed and applied *Parratt* and *Logan* to deprivations of property caused by the intentional, but unauthorized actions of state officials. "The controlling inquiry", the Court held,

[54] *Id.* at 543.

[55] *Id.* at 546 (separate opinion, joined by White, J.), *citing* Sniadach, Fuentes, and Goldberg.

[56] 455 U.S. 422, 436 (1982). In keeping with the distinction made in cases such as *Mackey*, *Logan* contrasted its situation with one in which a *post*-deprivation hearing was permissible because the deprivation "was based on a reliable pretermination finding". *Id.*, *citing* Barry v. Barchi, 443 U.S. 55, 64-65 (1979). Interestingly, *Logan* arose in Illinois—and the Illinois Supreme Court had held that the State's Legislature had authority to impose whatever "reasonable procedures" it desired to implement a state-created right. *Id.* at 427-28. This Court unequivocally rejected that argument. *Id.* at 431-32.

[57] ___ U.S. ___, 104 S. Ct. 3194 (1984).

"is solely whether the State is in a position to provide for predeprivation process." Although ruling against the complainant because he did "not even allege that the asserted destruction of his property occurred pursuant to a state procedure", the Court emphasized that "a postdeprivation state remedy" does *not* "satisf[y] due process where the property deprivation is effected *pursuant to an established state procedure*".[58]

Thus, *Parratt*, *Logan*, and *Hudson* v. *Palmer* add to the criteria of the decisions from *Sniadach* through *Mackey* the further element that: (xi) a seizure of property without a prior hearing cannot be constitutional where it occurs pursuant to an established state procedure under circumstances in which the government is in a position to, but does not, provide adequate *pre*-deprivation process.[59]

B. Rather than vindicating the arrangement for "proportionate-share payments", the very elements of the Board's and CTU's supposed defense—CTU's alleged "good-faith advance reduction" of the payments, its segregation of the monies in an "escrow" account that it alone controls, and the teachers' burden to prosecute a *post*-deprivation civil action in state court to recover any part of the monies CTU claims they owe—highlight the procedural-due-process bankruptcy of the wage-garnishment scheme.

The Board and CTU do not even attempt to square their wage-garnishment scheme with the principles this Court enunciated in its procedural-due-process decisions from *Sniadach* and *Fuentes* through *Logan* and *Hudson* v. *Palmer*—for the compelling reason that these principles

[58] *Id.* at ____, 104 S. Ct. at 3204 (emphasis supplied). The dichotomy is between "a deprivation of property * * * caused by conduct pursuant to established state procedure", and a deprivation arising from "random and unauthorized action [by state officials]". *Id.* at ____, 104 S. Ct. at 3203 (footnote omitted).

[59] Criteria (i) through (v) and (vi) through (x) appear *ante*, pp. 19-20 and 23-24.

utterly condemn the scheme.[60] Glossing over this omission, the Board and CTU instead pretend that the "combination of protective features for safeguarding objectors' rights—good faith advance reduction, 100% escrow, and the right to judicial review of CTU's determination of the amount of the proportionate share payment—eliminates any conceivable constitutional objection" to the *pre*-hearing seizure of the teachers' wages.[61] In actuality, however, this misnamed "combination of protective features" *is* the procedural-due-process violation, because in operation it effects a *pre*-hearing deprivation of the teachers' property by the government pursuant to an established state procedure, under circumstances in which the government is in a position to, but does not, provide any *pre*-deprivation process, instead relegating the teachers to a *post*-deprivation state-court tort remedy.

The only colorably "protective feature" in the scheme—but one which, on analysis, turns out to be as blackly unconstitutional as the others—is CTU's self-congratulatory "good-faith advance reduction". The "reduction" could be truly "protective" of the teachers' procedural-due-process rights if CTU included within it *all* of the *disputed* portion of the "proportionate-share payments". For, in as much as the teachers dispute the legality of the payments *in toto*, such an "advance reduction" would obviate all constitutional objections of a procedural nature by eliminating the wage-garnishments altogether. As CTU performs the "reduction", though, it is a mere question-begging sham.

To determine the "reduction", CTU subtracted from its total yearly expenditures what it admits are "expenditures for benefits conditioned upon membership [in CTU] and expenditures for political, ideological, charitable and philanthropic causes not related to the collective bargain-

[60] *See post*, pp. 30-33.

[61] CTU/Bd Br. at 18.

ing process", leaving some 95.4% of its expenditures that it claims are "chargeable to non-members" as its costs of "collective bargaining". And, although "reduction" in "union dues" so calculated was only 4.6%, CTU generously "decided to provide an advance reduction * * * of 5% for non-members".[62] Self-evidently, however, its formula is incompetent to calculate a figure that rationally reflects CTU's actual "collective-bargaining" expenses. And even if CTU accidentally arrived at the correct arithmetical result, the "reduction" would nevertheless be irrelevant to the procedural-due-process issue here for decision.

First, no evidentiary—or, the teachers submit, even rational—basis exists for crediting as accurate the formula: TOTAL CTU EXPENDITURES *minus* CERTAIN ADMITTED NON-COLLECTIVE-BARGAINING EXPENDITURES *equals* CTU'S COLLECTIVE-BARGAINING EXPENDITURES. For no evidentiary (or rational) basis exists for believing that CTU's *only* non-collective-bargaining expenses are those that it deigns to expose to public scrutiny; or, from the opposite perspective, that all its other, *un*disclosed expenditures subsidize *constitutional* "collective-bargaining" activities exclusively.[63] CTU's formula simply subtracts an arbitrary subtrahend from an arbitrary minuend, and then pretends that the necessarily arbitrary remainder provides constitutionally meaningful information![64]

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[62] *Id.* at 4 (footnote omitted).

[63] Common experience denies that public-sector unions engage almost exclusively in "collective-bargaining" activities. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231, 234, 236, 237 n.35 (opinion of Stewart, J.), 242-43 (opinion of Rehnquist, J.), 256-57 (opinion of Powell, J.) (1977) (commenting on the political nature and activities of public-sector unions). *See* Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 753-54 & n.6 (1963).

[64] A correct formula would be: "PROPORTIONATE-SHARE PAYMENT" *equals* A TEACHER'S *PRO RATA* SHARE *of* THE SUM OF ALL ITS EXPENSES THAT CTU PROVES, PRIOR TO ANY WAGE-GARNISHMENT, ARE "COLLECTIVE-BARGAINING" IN NATURE. This formula would constitute what the Board and CTU call a "protective featur[e]", though, only because *it would require for its implementation a* pre-*seizure hearing on the substantive issue of the character of CTU's expenditures.*

Second, even if the formula did fortuitously calculate the substantively correct figure for "proportionate-share payments", it could not obviate the procedural unconstitutionality of the *pre*-hearing wage-garnishments. For the teachers' procedural-due-process rights to a prior hearing do not depend on the likelihood that they will prevail at such a hearing.[65]

Similarly, from the perspective of procedural-due-process, CTU's vaunted "100% escrow" is beside the point. Because CTU might hold the "proportionate-share payments" in "escrow" until some court eventually determines how much CTU is entitled to spend, say the Board and CTU, "there is no risk that objectors will be deprived of their First Amendment liberty without Due Process".[66] But precisely because the Board and CTU have garnished the monies from the teachers' wages and placed them in CTU's "escrow" account without a *pre*-garnishment hearing, and then relegated the teachers to whatever redress a later state-court tort action may (or may not) provide, the "escrow" guarantees that the teachers are deprived of their property—the interim possession and use of their own wages—without due process. That is, *rather than obviating the "risk" of a due-process violation, the "escrow" constitutes that violation.* That the "escrow" may theoretically forefend violations of the teachers' First-Amendment rights is praiseworthy, but irrelevant even if true in practice. For the right to procedural due process does not depend upon a deprivation of property also abridging the victims' First-Amendment freedoms.[67]

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[65] *See* Fuentes v. Shevin, 407 U.S. 67, 87 (1972); Carey v. Piphus, 435 U.S. 247, 266 (1978).

[66] CTU/Bd Br. at 19.

[67] Thus, the Board and CTU are inadvertently correct when they state

Systematic application of the eleven criteria established in this Court's procedural-due-process decisions from *Sniadach* through *Hudson* v. *Palmer* proves beyond doubt what obviously appears on the face of the wage-garnishment scheme: namely, its thoroughgoing unconstitutionality.[68]

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that "the financial terms under which a proportionate share payment is held in escrow are of no constitutional significance; what is critical is that the money is in escrow". *Id.* at 21. For "what is critical" from the perspective of procedural due process is that, through an established state procedure, the government has garnished the teachers' wages, and funnelled the monies directly into CTU's possession, without a *pre*-garnishment hearing. How the monies came to reside in CTU's "escrow" account, not the "financial terms" thereof, frames the root procedural-due-process issue—and, under the circumstances of this case, necessarily decides it in the teachers' favor.

Logically, CTU and the Board can no more avoid an adverse judgment against them on procedural-due-process grounds because of CTU's "escrow" than could two thieves avoid a criminal conviction because one of them had temporarily stashed their loot in a safety-deposit box rather than immediately fencing it.

[68] *See ante*, pp. 19-20, 23-24, and 26. Because they carefully avoid mentioning *Sniadach* and the other procedural-due-process decisions that follow it, the Board and CTU never explicitly claim that the factual situation here presents one of those "extraordinary", "truly unusual", or "limited" cases in which the presumptive requirement of a *pre*-deprivation hearing is out of place. *See ante*, pp. 15-16. But they do argue that "the CTU 100% escrow system has an obvious drawback: the system cuts deeply against the governmental interests that justify requiring proportionate share payments * * * . Until all litigation is resolved, that system deprives the Union of any contributions from objectors, and thus places the entire burden of supporting the Union's collective bargaining activities on the nonobjectors". CTU/Bd Br. at 25. The short answers to this are—

First, CTU can hardly complain with good grace about the "obvious drawback" of a system it itself voluntarily implemented, and which it claims (albeit erroneously) is one (if not the most important) of the "combination of protective features" that supposedly "eliminates any conceivable constitutional objection" to the wage-garnishment scheme. *Id.* at 18.

Second, the record in this case contains not a scintilla of evidence supporting CTU's concern that, "[u]ntil all litigation is resolved," its

1. No extraordinary circumstances compel an immediate, *pre*-hearing garnishment of the teachers' wages to

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"escrow" arrangement "places the entire burden of supporting [CTU's] collective bargaining activities on the nonobjectors". In as much as the costs of CTU's "collective-bargaining activities" are unknown, no estimate of any arguable "burden * * * on the nonobjectors" is possible. Moreover, CTU presents no credible reason why, even if those costs were relatively large, it could not borrow sufficient funds to make up for the teachers' temporary nonpayment, later allocating to them their proper share of the interest-charges as collectible costs of "collective bargaining". And, in any event, CTU's complaint proves too much, in that *every* creditor could object on analogous grounds to procedural-due-process limitations on his ability to invoke state power for immediate seizure and transfer to him of disputed property in a debtor's possession.

Third, even if not fanciful, CTU's financial concerns are irrelevant. For, according to CTU's own legal theory that restricting its use of all "proportionate-share payments" until after a judicial determination of their legitimacy is necessary to obviate possible violations of the First Amendment, the *pre*- or *post*-seizure timing of the hearing is operatively beside the point. Under either procedure, CTU may expend *no* monies until *after* it has prevailed in whole or in part at the hearing.

Fourth, as this Court has noted, rejecting a parallel argument of a public utility, "delayed payment is not nonpayment, and there are means available * * * to recover at least some of the costs of a hearing". Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 20 n.25 (1978).

And fifth, at base CTU's complaint amounts to the inadmissible argument that its private convenience privileges it to disregard the commands of the Due Process Clause. "[C]onvenience alone", however, "is insufficient to make valid what otherwise is a violation of due process of law." Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 (1974); *see* Fuentes, 407 U.S. at 90-93. The "100% escrow" system has the same effect on CTU's expenditures as a judicial ruling that no seizures at all may precede a hearing. And, as to the latter situation, this Court has made clear that "a prior hearing always imposes some costs in time, effort, and expense, * * * [b]ut these rather ordinary costs cannot outweigh the constitutional right" to procedural due process. Fuentes, 407 U.S. at 90 n.22. Overwhelmingly immediate *governmental* interests may justify departures from the presumptive procedural-due-process right to a *pre*-deprivation hearing. But in a case such as this, operationally involving only a dispute between an alleged private creditor and private debt-

protect a substantial governmental interest that otherwise would be frustrated.

2. Other than the Board's agreement with CTU to garnish the teachers' wages, no state official (in particular, no judge) participated in the decision to initiate the garnishments, reviewed the factual or legal bases (if any) of CTU's claim before the seizures began, or evaluated the need for *pre*-hearing seizures.

3. No state statute or regulation or provision of the collective-bargaining agreement requires CTU to establish the probable validity of its claims, to make a convincing factual showing, or even to present some evidence beyond mere self-serving assertions before the wage-garnishments commence.

4. No mandate exists in state law for an early hearing on the propriety of the garnishments.

5. No safeguards protect against CTU's abuse of the "proportionate-share-payment" system for its own private gain.

6. When the wage-garnishments occur, CTU has no current legal interest in the monies the Board seizes from the teachers, only an abstract, unperfected claim to some undetermined portion of them.

7. What constitutes CTU's "collective-bargaining" ex-

ors, "care must be taken not to confuse the interest of partisan organizations with governmental interests". Elrod v. Burns, 427 U.S. 347, 362 (1976) (plurality opinion). "[S]tate intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health." Fuentes, 407 U.S. at 93. Indeed, that the Illinois Legislature made "proportionate-share-payment" arrangements merely *permissible*, but not mandatory, evidences its judgment that immediate seizures of employees' wages are unnecessary—or, that the governmental interest in those payments (whatever it may be) does not significantly exceed the government's general interest in effectuating the collection of private creditors' valid claims from their private debtors.

penses, for which "proportionate-share payments" are allowable, involves difficult questions of constitutional law, and complex evidentiary proofs with possibly critical reliance on the credibility and veracity of witnesses to CTU's operations, rather than resting on settled legal principles and objective facts within the knowledge of the Board.[69]

8. The teachers lack reasonable access to the only complete source of evidence concerning the propriety of CTU's claims: the officials, employees, and organizational records of CTU and its affiliates.

9. No neutral governmental official performed an immediate, independent review of the amount of the wage-garnishments.

10. Illinois law makes no provision for awards of damages or attorneys' fees to the teachers should the wage-garnishments ultimately prove wrongful, or even fraudulent. And,

11. The wage-garnishments occur pursuant to an established state procedure, under circumstances in which the government is in a position to, but does not, provide adequate—or even *any*—*pre*-deprivation process, but by default (if not by intention) relegates the teachers to a *post*-deprivation state-court tort action.[70]

Even more detailed citation of "chapter and verse" from *Sniadach* and succeeding cases proving the unconstitutionality of the wage-garnishment scheme is possible, but would simply bring owls to Athens. For inadvertently, the Board and CTU quite correctly close their brief with the observation that "[w]hat we have just shown is, of course,

[69] *See, e.g.*, Abood, 431 U.S. at 236.

[70] As the Board and CTU frankly admit, the wage-garnishment provision of their collective-bargaining agreement "parallel[s] the Illinois law". CTU/Bd Br. at 4.

sufficient to dispose of the case".[71] Anyone who reads that brief with the teaching of *Sniadach*, *Fuentes*, and so on in mind must immediately infer that the very description and arguments in favor of the wage-garnishment scheme that the Board and CTU present therein are indeed "sufficient to dispose of the case"—*but in the teachers' favor*.[72]

III. A constitutionally proper procedure requires that the Board refuse to garnish the teachers' wages until CTU establishes the cost basis of the "proportionate-share payments" it demands before an appropriate state administrative or judicial agency.

The foregoing analysis corroborates the Court of Appeals' finding that "[t]he procedure * * * adopted in this case [by the Board and CTU] is constitutionally inadequate, and they must go back to the drawing board".[73] Although this Court could simply affirm the Court of Appeals' judgment and remand for the Board and CTU to develop a new, constitutionally adequate procedure on their own, the teachers suggest that the Court exploit the present opportunity to instruct the parties and the lower courts as to the criteria of such a procedure.

A. First, the teachers agree with the Board and CTU that the Board is obviously *not* a suitable state agency to hold hearings on the validity of "proportionate-share payments".[74] Whether an Illinois state court, or perhaps the

[71] CTU/Bd Br. at 24.

[72] The Board and CTU also appear to rely on certain of this Court's summary dispositions that they say are "precedents" for the result they advocate. CTU/Bd Br. at 19 n.13, 26. That the Court considers *this* case worthy of full briefing, oral argument, and opinion, however, renders such reliance bootless. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500 (1981); Caban v. Mohammed, 441 U.S. 380, 390 n.9 (1979); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14 (1976).

[73] 743 F.2d at 1196.

[74] *See* CTU/Bd Br. at 23-24.

Illinois Educational Labor Relations Board (subject to judicial review), is the proper forum is a matter of state law, with which this Court should not now concern itself. On the other hand, that CTU's internal arbitration-scheme may not serve as the first, or even any, step in a constitutionally adequate procedure this Court should make clear.[75]

Although the Board and CTU appear to abandon CTU's internal arbitration-scheme as a defense to the teachers' procedural-due-process challenge, relying instead on CTU's (faulty) "100% escrow" and the teachers' supposed right to seek "a final *judicial* determination as to whether the amount of the payment comports with Illinois law and the Constitution", they also note that "the Illinois state courts, as a matter of state law, [might require] invocation of union remedies before adjudicating an objector's claim".[76] No such preliminary "invocation of union remedies" is permissible, however. Even as the teachers' statutory exclusive collective-bargaining representative, CTU lacks authority to require them, through either its unilateral dictate or an agreement it negotiates with the Board, to submit their statutory and constitutional claims to a private arbitrator.[77] And even if such authority existed where the arbitration-scheme satisfied the requirements of procedural due process, CTU could not exercise it where, as here, the scheme is procedurally

[75] In the past, equivocal language in some of this Court's opinions has apparently misled unions into adopting "fair-share-fee" arrangements that, on later plenary review, this Court has held illegal, such as the "rebate program" invalidated in *Ellis*. *See* Ellis, ____ U.S. ____, 104 S. Ct. at 1889-90. A definitive pronouncement on the internal-union arbitration-issue here could obviate protracted litigation in both state and federal courts that is otherwise sure to follow in this and other cases.

[76] CTU/Bd Br. at 22-23, 5 n.5.

[77] *See* McDonald v. City of West Branch, ____ U.S. ____, ____, 104 S. Ct. 1799, 1803-04 (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 743-46 (1981); NLRB v. Magnavox Co., 415 U.S. 322,

improper on its face.[78]

B. Second, the teachers nevertheless agree with the Court of Appeals that *the Board* must create *some* procedure "for determining dissenters' objections [to the 'proportionate-share payments']".[79] At a minimum the Board should require CTU, as a condition precedent to the Board's garnishment of the teachers' wages, to secure the appropriate state agency's certified final judgment that the requested payments are lawful.

C. Third, the method for calculating the teachers' "proportionate-share payments" cannot lawfully or logically follow CTU's "subtractive" approach. CTU arrives at the "payments" it demands by subtracting from its regular membership-dues what it admits are "expenditures for benefits conditioned upon membership and expenditures for political, ideological, charitable and philanthropic causes not related to the collective bargaining process".[80] Besides assuming without proof that these self-disclosed "expenditures * * * not related to the collective bargaining process" constitute *all* such expenditures CTU makes, CTU's formula also assumes—without proof and contrary to common experience—that *all* its other, *un*disclosed expenditures *necessarily are* "related to the collective bargaining process". Even leaving aside the difficult definitional

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324-26 (1974); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974); Glover v. St. Louis-S.F. Ry., 393 U.S. 324, 329-31 (1969); Steele v. Louisville & N.R.R., 323 U.S. 192, 206 (1944). The Court of Appeals correctly applied the rationale of these decisions. *See* 743 F.2d at 1195-96.

[78] *See* the Court of Appeals' analysis, which the Board and CTU refrain even from challenging, 743 F.2d at 1194-95. *See also* Schweiker v. McClure, 456 U.S. 188, 195-97 (1982); Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980); Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972).

[79] 743 F.2d at 1197.

[80] CTU/Bd Br. at 4.

problems of constitutional law as to what union activities do and do not "relat[e] to the collective bargaining process", which CTU's approach licenses it to determine unilaterally and without adequate judicial review, this Court must dismiss CTU's "subtractive" methodology as factually non-rational, and therefore impermissible under the Due Process Clause.

The constitutionally correct methodology for calculating "proportionate-share payments" should parallel the "additive" formula federal courts impose on administrative agencies that assess "service fees" against the regulated private parties they specially benefit. In outline—

1. CTU "must *justify* the assessment * * * by a clear statement of the particular service * * * which it is expected to reimburse"[81]—"identify[ing] the activity which justifies each particular fee", and "mak[ing] a public statement of the specific expenses which are included in the cost basis for that fee".[82] This approach is clearly *additive*: "listing the specific expenses which form the cost basis of the * * * fees". CTU may not simply "beg[i]n with its total budget and eliminat[e] * * * activities" it admits are not chargeable; or assess the "total cost" of its operations "all reduced by an unexplained percentage"; or approach "its task backwards, starting with totals and eliminating items rather than selecting certain expenses * * * related in a significant degree to the particular service which is the alleged justification for * * * the fee, and then adding up such items".[83]

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[81] National Ass'n of Broadcasters v. FCC, 554 F.2d 1118, 1133 (D.C. Cir. 1976); Electronic Industries Ass'n, Consumer Electronics Group v. FCC, 554 F.2d 1109, 1117 (D.C. Cir. 1976); *see* Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1137-38 (D.C. Cir. 1976).

[82] National Cable Television Ass'n, Inc. v. FCC, 554 F.2d 1094, 1100, 1104 (D.C. Cir. 1976).

[83] *Id.* at 1105 (footnote omitted).

2. CTU's "clear statement of the particular service" must include an "explanation of what activities were performed" and "how these activities related to" collective bargaining on the teachers' behalf, with an "explanation of the criteria used in eliminating certain costs and retaining others".[84]

3. Because CTU may demand a "proportionate-share payment" "only for 'those activities that are specifically identified as * * * benefitting'" the teachers, and are "indeed beneficial" to them, it must demonstrate "a sufficient nexus between the * * * service for which the fee is charged" and the teachers, and show that "the service * * * *primarily* provide[s] special benefits to [them]", or charge no fee at all.[85] And,

4. CTU must "show the particular costs * * * assess[ed] against the [teachers] * * * so as to assure them that they are paying only for the specific expenses * * * incurred in connection with" collective bargaining, rather than simply "figur[ing] the total cost * * * for operating * * * and then * * * contriv[ing] a formula that reimburses [it] for that amount", or simply lumping the "[c]osts of * * * generic activities" into its demands for "payments".[86] The proper procedure, in short, is for CTU to "calculate the *cost basis* for each fee assessed".[87]

Given these guidelines, the Board, CTU, and the state

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[84] National Ass'n of Broadcasters, 554 F.2d at 1133; National Cable Television Ass'n, Inc., 554 F.2d at 1105.

[85] National Cable Television Ass'n, Inc., 554 F.2d at 1104; FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974); Public Serv. Co. of Colorado v. Andrus, 433 F. Supp. 144, 152 (D. Colo. 1977); Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223, 230 (5th Cir. 1979).

[86] National Cable Television Ass'n, Inc., 554 F.2d at 1104-05; National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 343 (1974); Mississippi Power & Light Co., 601 F.2d at 231 n.17.

[87] Electronic Industries Ass'n, Consumer Electronics Group, 554 F.2d at 1117 (emphasis retained).

agencies that ultimately assert jurisdiction over the "proportionate-share-payment" problem will have a sound legal basis for developing a procedure that both preserves the teachers' property-rights in the possession and use of their wages and accommodates CTU's claim to reimbursement for its demonstrated "collective-bargaining" expenses on their behalf.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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No. 84-1503

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, *et al.*,
Petitioners,
v.
ANNIE LEE HUDSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE CHICAGO TEACHERS UNION, LOCAL NO. 1, ET AL., PETITIONERS, AND FOR THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL., RESPONDENTS SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The court below held that a public employee who is represented by an exclusive bargaining representative and who objects to providing financial support to that representative is deprived of liberty without due process where an employer, acting pursuant to state law, deducts from the individual's pay an amount equal to the proportion of union dues that the union has determined it expends on collective bargaining and contract administration and where the union places that money in escrow pending an arbitrator's or state court's review of the union's determination. The question presented by this decision is:

> Is the court of appeals' holding that the procedure at issue here is unconstitutional contrary to this Court's opinions interpreting the First and Fourteenth Amendments and, in particular, its opinions in the line of cases from *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956) to *Ellis v. Railway Clerks*, —— U.S. ——, 52 L.W. 4499 (1984) and its recent summary decisions in *Jibson v. White Cloud Education Association*, —— U.S. ——, 53 L.W. 3268 (1984) and *Kempner v. Local 2077*, —— U.S. ——, 53 L.W. 3323 (1984)? *

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* The parties to this case are the following: (1) The plaintiffs-appellees below: Annie Lee Hudson; K. Celeste Campbell; Estherlene Holmes; Edna Rose McCoy; Dr. Debra Ann Petitan; Walter A. Sherrill; and Beverly F. Underwood; (2) the defendants-appellants below: The Chicago Teachers Union, Local No. 1; Robert M. Healey; Jacqueline B. Vaughn; Rochelle D. Hart; Thomas H. Reece; Glendis Hambrick, individually and as officers of the Chicago Teachers Union; Board of Education of the City of Chicago, Illinois; Raoul Villalobos; Martha Jantho; Thomas Corcoran; Betty Bonow; Sol Brandzel; Clark Burrus; Leon Jackson; Rose Mary Janus; Dr. Wilfred Reid; Myrna Salazar; Dr. Luis Falces; Viola Thomas, individually and as officers and members of the Board of Education for the City of Chicago, Illinois.

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BRIEF FOR THE CHICAGO TEACHERS UNION, LOCAL NO. 1, ET AL., PETITIONERS, AND FOR THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL., RESPONDENTS SUPPORTING PETITIONERS

This brief is submitted jointly by the Chicago Teachers Union Local No. 1 *et al.*, petitioners, and the Board of Education of the City of Chicago and its officers and members, respondents supporting petitioners.[1] The petitioners and those respondents were co-defendants in the district court and co-appellees in the court of appeals. The petitioners and the respondents supporting petition-

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[1] Although the Board of Education and its officers and members participated actively in the lower courts, they did not because of the press of events file their own *certiorari* petition from the adverse decision of the court of appeals. Once this Court issued a writ of *certiorari*, the Board and its officers and members determined to participate actively as a party in this Court and in so doing to align themselves in support of the position of the petitioners, their fellow defendants-appellees in the courts below.

ers have a common legal position in this case, and they submit this joint brief to state that position only once.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported at 573 F.Supp. 1505 and is reprinted at pp. A-24 to A-57 of the Appendix to the Petition for a Writ of Certiorari (hereinafter "App."). The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 743 F.2d 1187 and is reprinted at App. A-1 to A-21.

JURISDICTION

The Seventh Circuit's judgment was entered on September 6, 1984. App. A-22. Timely petitions for rehearing *en banc* were denied on October 24, 1984. App. A-23. On January 14, 1985, Justice Stevens signed an order extending the time for filing a petition for a writ of *certiorari* to and including March 23, 1985. The *certiorari* petition was filed that day and was granted on June 10, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Illinois Revised Statutes, ch. 122, § 10-22.40(a) (1983) at all times relevant here provided:

> Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization.

STATEMENT OF THE CASE

Chicago Teachers Union, Local No. 1 ("CTU" or "the Union") is the exclusive bargaining representative for a unit of 27,500 employees comprised of teachers and other educational workers employed by the Board of Education of the City of Chicago ("the Board of Education" or "the Board"). App. A-1, A-26.

During the period 1967 through November, 1982, every employee in the bargaining unit received all the benefits of the CTU-Board of Education collective bargaining agreement and its administration by the Union, but not every such employee elected to join CTU and thereby to pay his/her financial share for CTU's activities on behalf of the employee group. App. A-25 to A-26. Effective August 1, 1981, the Illinois legislature enacted a statute providing that a collective bargaining agreement covering public school employees may contain "a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required by members"; under the statute these "proportionate share payments shall be deducted by the Board from the earnings of the non-member employees and paid to the representative organization." Ill. Rev. Stat. ch. 122, § 10-22.40a(1983). App. A-26 to A-27.[2]

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[2] Effective July 1, 1984, the Illinois statute quoted in text was superseded by the Illinois Education Labor Relations Act, Ill. Stat. Ann. ch. 48 ¶ 1701, *et seq.* (Smith-Hurd 1984 Supp.). That law authorizes the deduction from non-members' earnings of a "fair share fee for services rendered . . . not to exceed the dues uniformly required of members" and "not [to] include any fees for contributions related to the election or support of any candidate for political office." *Id.*, ¶ 1711. Under that provision, the "exclusive representative shall certify to the employer . . . each non-member's fair share fee" and that fee "shall be deducted by the employer from the earnings of the non-member employees and paid to the exclusive representative." *Id.*

CTU and the Board of Education thereafter agreed to a provision in their collective bargaining agreement that became effective September 1, 1982 paralleling the Illinois law and providing for the deduction of "proportionate share payments" from the earnings of bargaining unit employees who are not members of CTU. App. A-27.[3]

Following the negotiation of the contract, CTU made what the district court found to be "a thorough analysis of its financial records in good faith compliance with both the statute and its agreement with the Board." App. A-51. Subtracting expenditures for benefits conditioned upon membership and expenditures for political,[4] ideological, charitable and philanthropic causes not related to the collective bargaining process, the Union determined that 95.4% of its expenditures in the prior year had been for matters chargeable to non-members, *viz.*, for "the collective bargaining process and contract administration." To provide a margin for mathematical miscalculation or oversights, CTU decided to provide an advance reduction in union dues of 5% for non-members, yielding ten monthly proportionate share payments of $16.48 for non-member teachers, and $11.54 for non-members employed in the bargaining unit in other capacities. App. A-29. The district court found that the Union "carefully documented its calculation of the fair share fee." App. A-45. In December, 1982, the Board of Education commenced

[3] A "proportionate share payment" is referred to in other jurisdictions as a "fair share fee," a "service fee" or an "agency shop fee." We use the term "proportionate share payment" here because that is the term contained in the Illinois law.

[4] In 1981-82, CTU had established a separate CTU-PAC, funded only by voluntary contributions, from which all political contributions thereafter were made. R. 58; Tr. 63, 100-102. Thus, the only political expenditures from the Union's general fund were such incidental costs as clerical wages for preparing mailings, postage and phone bank expenses.

deducting proportionate share payments from non-members' earnings on the basis of CTU's calculation. App. A-45.

Before the first deductions were made, CTU established an appeals procedure to adjudicate any objections non-members might raise "concerning the existence and/or propriety of expenditures included in the proportionate share payments." App. A-28. That appeals procedure begins with an internal union review and culminates in a decision by an impartial arbitrator, accredited by a national arbitration organization and appointed by the CTU president from a list maintained by the Illinois State Board of Education for adjudicating tenured teacher dismissals. In addition, the Illinois courts, under their general "jurisdiction to adjudicate all controversies," *Lopin v. Cullerton*, 46 Ill. App. 3d 387, 361 N.E.2d 6 (1977), *see also Roth v. Yackley*, 77 Ill.2d 423, 396 N.E.2d 520 (1979), are open to any non-member who believes that he/she is being charged for expenses that are not part of the cost of "the collective bargaining process and contract administration," in violation of the statute.[5]

The seven employees of the Board of Education who are respondents in this case at all times relevant here worked in the bargaining unit represented by CTU but were not members of the Union. App. A-30. After the deduction of the proportionate share payments began, one of the respondents wrote to CTU objecting that the charge was more than a pro rata share of the Union's expenditures for collective bargaining and contract administration; a second respondent wrote to CTU objecting to the deduction of any amount from her sal-

[5] Whether the Illinois state courts, as a matter of state law, would have required invocation of union remedies before adjudicating an objector's claim is uncertain, as no objector sued in state court.

ary. App. A-30 to A-31.[6] The Union responded by letter explaining the legal basis for the proportionate share payment, the manner in which the sum had been calculated by CTU, and the internal appeals procedure CTU had established; the letters stated that "[a]ny objection you may file will be recognized and processed in full compliance with the prescribed procedures . . ." App. A-31.

None of the employee-respondents pursued CTU's internal procedure in response to the Union's letters, nor did any of them sue in state court under Illinois law to challenge the amount of the deduction. Instead, in March 1983, the employee-respondents commenced this action in federal court against the Board of Education and CTU alleging that the deduction by the Board of the proportionate share payments deprived them of freedom of expression and association and of due process of law. The district court dismissed these claims. R-71.

On appeal, the employee-respondents elected to "make almost their whole attack on the *procedure* for determining how much shall be deducted." App. A-3 (emphasis added). Thus, as the court below stated, the question that was posed by the employee-respondents on appeal was whether they

> have a federal right to challenge a procedure that may not have resulted in any improper expenditures —whether, in other words, even if the union has not used any of the money it has collected from objecting employees to promote political activities unrelated to its role in collective bargaining, the plaintiffs can still complain that they have been deprived of the liberty secured them by the Constitution. [App. A-4 to A-5.]

[6] Two other employee-respondents submitted "objections" to CTU before the amount of the proportionate share payment was set; the remaining three employee-respondents never notified CTU that they objected to the proportionate share payments. App. A-30. The district court concluded that these five respondents were not entitled to any relief as they had not protested the fee to CTU. App. A-33. The court of appeals did not disturb the district court's ruling in this regard, and these five respondents have not cross-petitioned to seek review of that ruling.

Before the case reached the court of appeals, CTU began voluntarily placing in escrow the proportionate share payments of non-members who had perfected an objection and CTU amended its procedure for collecting proportionate share payments to include an escrow provision. App. A-14. Under that escrow arrangement, if a non-member submits an objection to the amount of the advance reduction determined by the Union, the entire amount of the objector's reduced payments is held in an interest-bearing escrow account until a determination is made as to whether the payment represents a *pro rata* share of the cost of collective bargaining and contract administration.

Thus, the appellate court was presented with and decided a case in which the issue is the constitutionality of a procedure that provides that: (i) objectors are to pay what the district court found to be "a carefully precalculated portion of union dues" (a portion based on CTU's "good faith," "carefully documented" calculation of the percentage of its income expended on matters related to the collective bargaining process in the immediately preceding year), App. A-45, A-51; and (ii) the full amount of the objector's payment is placed in an escrow account *pendente lite*. The court below held that procedure to be constitutionally defective. That court concluded that a public employer may deduct proportionate share payments only if the employer "establish[es] a procedure that will make reasonably sure that the wages of non-union employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining." App. A-9; *see also* n. 9 *infra*. Specifically, the court below stated:

> Without wanting to be dogmatic or to foreclose consideration of alternative procedures, we suggest that the constitutional minimum would be fair notice, a

> prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision. [App. A-12 to A-13.]

And the court of appeals emphasized that the burden was on "the Board, pursuant to our decision, [to] create[] such procedures." App. A-9.

SUMMARY OF ARGUMENT

Although the question posed here is one of constitutional procedure—whether the system for effectuating the "proportionate share payment" requirement in the collective bargaining agreement between CTU and the Board of Education violates the constitutional rights of objecting employees—to answer that question it is necessary first to understand the substantive constitutional rights that are implicated. This Court's decisions make clear that employees do not have an absolute constitutional right of nonassociation that privileges a total refusal to provide any financial support to their exclusive bargaining representative, and that therefore the collection of a proportionate share fee does not in and of itself pose any constitutional issue. Objecting employees do, however, have a limited constitutional right pertaining to the *use* of their funds: those moneys may not be used to finance political or ideological activity unrelated to collective bargaining. It follows that in collecting proportionate share payments, a mechanism must be established to "prevent[] compulsory subsidization of ideological activity by employees who object thereto." *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977). But that mechanism must not "restrict[] the Union's ability to require every employee to contribute to the cost of collective bargaining activities," *id.*, and thereby unduly burden nonobjectors; the aim is to "protect both [majority and minority] interests to the maximum extent possible without

undue impingement of one on the other." *Machinists v. Street*, 367 U.S. 740, 771 (1961). Part A, pp. 10-15, *infra.*

The proportionate share procedure at issue in this case satisfies the requirements of the Constitution. Not only does CTU reduce the payments made by objectors based on the Union's careful, good faith determination of the proportion of its expenditures that goes for purposes that objectors may not lawfully be required to support, but, morever, 100% of the objector's precalculated and reduced proportionate share payment is placed in escrow, and thus is not available to the Union for its use, pending invocation of the Union's internal procedure and/or judicial review. There is therefore no possibility of even temporary "compulsory subsidization of ideological activity by employees who object thereto." In short, the combination of an advance reduction and a 100% escrow necessarily satisfies all constitutional requirements, as this Court's decision in *Ellis v. Railway Clerks*, —— U.S. ——, 52 L.W. 4499 (1984), unmistakably teaches. Part B, pp. 16-19, *infra.*

The court of appeals' criticism of the escrow system here is wide of the mark. The fact that CTU is not legally obligated to continue the escrow is irrelevant: the Union is committed to continuing that procedure and, in any event, CTU's procedure for effecting proportionate share payments must be judged as the procedure exists at present, and cannot be held unconstitutional because of the theoretical possibility that CTU will in the future adopt some *other* procedure that might not pass constitutional muster. Similarly, the financial terms under which proportionate share payments are held in escrow are of no constitutional significance; what is critical is that the money is in escrow and therefore is not available to the union for its use. The objector's "grievance stems from the spending of their funds" for unauthorized purposes and "not from the enforcement

of the union-shop agreement by the mere collection of funds." *Street*, 367 U.S. at 771. And the appellate court's concern over CTU's internal appeals procedure is likewise misplaced, because an objector's proportionate share payment is not reelased from escrow at the culmination of the internal proceeding but continues in escrow until the objector has, if he/she wishes, secured a final judicial determination—through procedures satisfying every conceivable Due Process requirement—that the amount of the payment comports with Illinois law and with the Constitution. Part C, pp. 20-24, *infra*.

None of this is meant to suggest that a 100% escrow procedure is constitutionally required. Such a procedure has an obvious drawback: by denying the union any money from objectors *pendente lite*, the 100% escrow cuts deeply against the governmental interests that justify the proportionate share payment system and against the constitutional interests of nonobjecting employees. There are alternative procedures, approved in general terms in *Ellis*, which deny the union use of only part of the objectors' payments pending judicial review of the amount of the payment. Such procedures can reduce to virtual insignificance the risk that objectors' funds will be used temporarily to subsidize activities to which objectors need not contribute. And whatever theoretical danger of temporary subsidization may remain under such procedures is far outweighed by the certainty that denying the union any part of the objectors' money would burden the nonobjectors by requiring them temporarily to shoulder the full cost of the union's collective bargaining activities. Part D, pp. 24-28, *infra*.

ARGUMENT

THE PROCEDURES FOR ASSESSING PROPORTIONATE SHARE PAYMENTS AT ISSUE HERE SATISFY THE REQUIREMENTS OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. *The Underlying Substantive First Amendment Rights.* As the court below observed, the question posed by this case is one of constitutional procedure: whether the system for effectuating the "proportionate share payment" requirement in the collective bargaining agreement between CTU and the Board of Education violates the constitutional rights of objecting employees. To answer that question it is necessary first to be clear as to the nature of the substantive constitutional rights that are implicated. We thus begin by reviewing this Court's teachings on that subject.

There is no doubt that employees do not have an absolute constitutional right of non-association that privileges a total refusal to provide any financial support to their exclusive bargaining representative. This much was established almost three decades ago in *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), in which the Court held that "the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work . . . does not violate either the First or Fifth Amendments." *Id.* at 238. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court reaffirmed, and elaborated on, that conclusion:

> To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. An employee may well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. . . . To be required to help finance the union as a collective bargaining agent might well be thought . . . to interfere in some way with an employee's freedom to associate for the

advancement of ideas, or to refrain from doing so, as he sees fit. *But the judgment clearly made in Hanson . . . is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.* "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." [431 U.S. at 222-23; emphasis added.]

Thus, as *Hanson* and *Abood* show, and as *Machinists v. Street*, 367 U.S. 740, 771 (1961), states in terms, "the union-shop agreement itself is not unlawful," and objectors have no constitutional grievance "from the enforcement of the union shop agreement by the mere collection of funds." [7]

At the same time, *Abood* establishes that objecting employees do have a limited constitutional right pertaining to the *use* of their funds. The objectors in *Abood* "specifically argue[d] that they may constitutionally prevent the Union's spending a part of their required service fees to

[7] The court of appeals thought that *Hanson* is "no longer authoritative" insofar as that case holds that "the use of agency fees for contract negotiation and administration" is not a "deprivation of liberty that is forbidden to the states and their agencies without due process of law." App. A-8. But as the quotation in the text from *Abood* shows, *Hanson* was reaffirmed on precisely this point in *Abood;* indeed, the *Abood* Court quoted the very passages in *Hanson* that the court below cited as "no longer authoritative," *compare Abood, supra,* 431 U.S. at 217-19 *with* App. A-8, and the *Abood* Court expressly refused the invitation of the objecting employees in that case to "revers[e] the *Hanson* case, *sub silentio.*" 431 U.S. at 223. In *Ellis v. Railway Clerks,* —— U.S. ——, 52 L.W. 4499, 4504 (1984), the Court again reaffirmed *Hanson,* citing the very passages the court below thought to be "no longer authoritative" as establishing that a union security agreement "is justified by the governmental interest in industrial peace."

contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." 431 U.S. at 234. The Court "concluded that this argument is a meritorious one," holding as follows:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective bargaining representative. Rather, the Constitution requires only that such expenditure be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment. [431 U.S. at 235-236.] [8]

Thus, "while it has long been settled that such interference with First Amendment rights [as may result from a union security agreement] is justified by the governmental interest in industrial peace," it is equally plain that the "First Amendment does limit the uses to which the union can put funds obtained from dissenting employees." *Ellis v. Railway Clerks,* —— U.S. ——, 52 L.W. 4499, 4504 (1984). The objector's only cognizable complaint, then, "stems from the spending of their funds for purposes not authorized by the [Constitution]; [i]f [objectors'] money were used for [permissible] purposes . . . [the objectors] would have no grievance at all." *Street,* 367 U.S. at 771.

It follows, as *Abood* makes clear, that while the Constitution permits collecting proportionate share payments from objectors, a mechanism must be established to "pre-

[8] In *Street,* the Court, to avoid constitutional difficulties, construed the Railway Labor Act "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." 367 U.S. at 768-69. In *Abood,* the Court held that the First Amendment itself precludes such a use of an objector's payments.

vent[] compulsory subsidization of ideological activity by employees who object thereto." 431 U.S. at 237. Indeed, "the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Ellis*, 52 L.W. at 4501. *See also Abood*, 431 U.S. at 244 (Stevens, J., concurring). But as *Abood* also establishes, whatever procedure is developed should not "restrict[] the Union's ability to require every employee to contribute to the cost of collective bargaining activities," 431 U.S. at 237, as to do so "might well interfere with the . . . unions' performance of [their] functions and duties," *Street*, 367 U.S. at 771-72. And that conclusion is buttressed by the need to safeguard the First Amendment rights of non-objecting employees, for "union members who do wish part of their dues to be used for political purposes have a right to associate to that end 'without being silenced by the dissenters.'" *Abood*, 431 U.S. at 238. The aim, in short, is "[t]o attain the appropriate reconciliation between majority and dissenting interests" by "select[ing] remedies which protect both interests to the maximum extent possible without undue impingement of one on the other." *Street*, 367 U.S. at 771.

Read together, the decisions from *Hanson* to *Ellis* teach three lessons that are relevant here. First, in light of "the governmental interest in industrial peace," an objector may constitutionally be required "to support financially an organization with whose principles and demands he may disagree," notwithstanding the objector's countervailing "First Amendment interests." *Ellis*, 52 L.W. at 4504. Second, an objector's money may not constitutionally be used, even temporarily, for "ideological activities unrelated to collective bargaining." *Abood*, 431 U.S. at 236. And third, the courts while "preventing compulsory subsidization of ideological activity by employees who object thereto" must not "restrict[] the Union's ability to require every employee to contribute to the cost of collective bargaining activities." *Abood*,

431 U.S. at 231. It is against this backdrop that the issue of constitutional procedure posed by this case must be addressed.[9]

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[9] The court below thought that objectors enjoy yet another constitutional right, albeit one not recognized in *Abood*, *see* App. A-8: the right to refuse to "support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological," App. at A-9 (emphasis in original). That court found this right in the "freedom of association" (or more precisely in the "'freedom not to associate'") as distinguished from the "freedom of expression" which latter freedom, according to the appellate court, is the basis for an objector's right not to be compelled to support "political and ideological activities." *See* App. A-5 to A-9. The court below reasoned that each additional penny an objector is required to contribute to a union somehow works an additional deprivation of an objector's freedom not to associate with the union and that therefore proportionate share payments may "go no further than is necessary to prevent the individual from taking a free ride on an entity that . . . is providing services to him as his collective bargaining representative." App. at A-7.

The lower court's opinion in this regard is squarely contrary to *Ellis*. In upholding the constitutionality of the Railway Labor Act insofar as the RLA requires objectors to contribute to the cost of union social activities open to all bargaining unit employees, the Court in *Ellis* reasoned that because a social activity does not involve "communicative content" or "the expression of ideas," the only conceivable basis for objecting to supporting this activity "stems from the union's involvement in it. The objection is that these are *union* social hours." 52 L.W. at 4504 (emphasis in original). The Court found that an insufficient basis for recognizing a constitutional privilege because, unlike the court below, this Court concluded that the additional monetary charge "does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union." *Id.* Thus, under *Ellis* only expenditures that "involve *additional* interference with the First Amendment interests of objecting employees" over that occasioned by supporting collective bargaining activity narrowly defined raise constitutional issues. *Id.* Because, as *Ellis* demonstrates, expenditures for union activity of a non-political, non-ideological nature do not involve such interference, objectors may be compelled to support such activity.

We do not pursue further the conflict between the decision below and *Ellis* on this point for two reasons. First, because even the

B. *The Validity of the Initial Reduction and 100% Escrow System At Issue Here.* After *Abood* and *Ellis* there is no doubt that while the collection of proportionate share payments from objectors does not, in and of itself, raise constitutional questions, the use of such payments by a union may.[10] It is therefore settled that there must be adequate safeguards to assure that the objectors' moneys are not improperly used, even temporarily. In this regard the Court has observed that there are several "readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest burden, if any, on the union." *Ellis*, 52 L.W. at 4501.

The requirement that one of these alternatives be used to effectuate a proportionate share payment agreement may be viewed, as the court below suggested, either as a mandate of the First Amendment (as made applicable to the States through the substantive component of the Due Process Clause), App. A-5, or, alternatively, as a mandate of the procedural component of the Due Process Clause, whose application is triggered by the existence of the ob-

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court below acknowledged that objectors may constitutionally be required to support activities "germane to collective bargaining," App. A-9, and because the Illinois law permits compelled contributions for the "cost of the collective-bargaining process and contract administration," it is entirely hypothetical whether there are any activities which an objector may be required to support under the statute as to which the court below would extend a constitutional privilege. Second, for purposes of the procedural issue presented in this case it is not necessary to determine whether union activities that are non-ideological and non-political but arguably not germane to collective bargaining are chargeable or non-chargeable to objectors; that determination is relevant only in fixing the *substantive standard* to be applied in assessing the amount of proportionate share payments.

[10] Because the Board of Education's only involvement in the proportionate-share payment system is to participate in the collection of those payments which, in and of itself, does not raise a constitutional issue, the claim against the Board is of the most attenuated kind.

jector's First Amendment right to be free from providing "compulsory subsidization of ideological activity," which right is part of the "liberty" that the Due Process Clause protects, App. A-6 to A-8.[11] But as we proceed to show, whatever the source of this requirement, the court below erred in concluding that the procedure at issue here is constitutionally insufficient and in ordering the Board of Education to create cumbersome, additional procedures.

The court below acknowledged, albeit grudgingly, that CTU "calculated the percentage of its expenditures that it believed (or at least claimed) had been costs of negotiating or administering the contract" and CTU set the pro-

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[11] Insofar as an individual has a First Amendment right to engage, or not engage, in certain conduct there is no doubt that the right is part of the "liberty" of which an individual cannot be deprived without Due Process; indeed, that is the premise on which the Bill of Rights has been held to be applicable to the States.

There is language in the opinion below that goes much further and suggests that an interest that is cognizable under the First Amendment but does *not* rise to the level of a constitutional right because outweighed by some countervailing governmental interest nonetheless constitutes part of the "liberty" protected by Due Process. Specifically, the court below stated:

> [*Abood*] made clear . . . that even the use of agency fees for contract negotiation and administration is an interference with First Amendment liberty (though a lawful interference), offering as an example the union's negotiating a clause requiring the employer to reimburse employees for the expense of abortions. *Such interference is a deprivation of liberty that is forbidden to the states and their agencies without due process of law.* [App. A-8; emphasis added; citations omitted. *See also* App. A-6.]

This suggestion is wrong; the lower court's reasoning would effectively extend the protection afforded to constitutional *rights* to every inchoate constitutional interest that does *not* rise to the level of a right. And the lower court would accomplish this protection of non-rights by the discredited technique of giving an extraordinary expansive reading to the term "liberty" as used in th Due Process Clause. Nothing in this Court's modern jurisprudence supports this approach.

portionate share payment at that percent of dues. App. A-9; *see also id.* A-14.[12] That court also acknowledged that CTU "voluntarily plac[es] dissenters' agency fees in escrow." App. A-14. Specifically, if a non-member in the CTU bargaining unit objects to the proportionate share deduction (in the "carefully precalculated" reduced amount determined by the Union "in good faith"), the payment is placed in an escrow account until the objector has invoked his/her chosen avenues of challenge, including litigation in the state court system, and has secured a final determination whether the union erred in calculating the advance reduction, *viz.*, whether the amount of the payment encompasses a share of union expenditures to which the objector may not statutorily or constitutionally be compelled to contribute. This combination of protective features for safeguarding objectors' rights—good faith advance reduction, 100% escrow, and the right to judicial review of CTU's determination of the amount of the proportionate share payment—eliminates any conceivable constitutional objection to CTU's system for effectuating the proportionate share payments.

Under this system, there is no possibility that the Union will be able "to commit dissenters' funds to improper uses even temporarily." *Ellis*, 52 L.W. at 4501. Not only does CTU make a careful, good faith advance determination of the portion of its expenditures that goes for purposes for which objectors may lawfully be charged but, moreover, the escrow arrangement means that the Union is unable to commit objectors' funds to *any* use whatsoever until after the objector has secured

[12] Contrast the appellate court's statement concerning CTU's advance reduction with the district court's findings—improperly ignored by the court of appeals, *see Anderson v. City of Besemer*, —— U.S. ——, 53 L.W. 4314, 4317 (1985)—that "CTU made a thorough analysis of its financial records in good faith compliance with both the statute and its agreement with the Board," App. A-51, and that "[t]he union carefully documented its calculation of the fair share fee." App. A-45.

state court review of the Union's determination. And on release from escrow, the Union receives only the amount of money equal to the percentage of its expenditures determined by the court to have been spent for collective bargaining and contract administration. Consequently there is no risk that objectors will be deprived of their First Amendment liberty without Due Process.

The short of the matter is this: given that the constitutional right at stake here is the objector's right not to have his payments *used* by a union for certain purposes, a system which prevents the money from being used by the union for *any* purpose until a final judicial determination is made as to the purposes for which the objector's fee may be used necessarily passes constitutional muster. Accordingly, the court below erred in holding the CTU 100% escrow procedure to be unconstitutional.

Ellis itself commands this conclusion. After noting the detriments to the objectors of the procedure at issue there, in which the union "exact[ed] and us[ed] full dues, then refund[ed] months later the portion that it was not allowed to exact in the first place," the Court stated:

> The only justification for this . . . would be administrative convenience. But there are readily available alternatives, *such as advance reduction of dues and/or interest-bearing escrow accounts*, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. [52 L.W. at 4501; emphasis added.] [13]

[13] In this regard, *Ellis* follows this Court's summary decision in *Threlkeld v. Robbinsdale Federation of Teachers*, 459 U.S. 802 (1982). That case came to this Court on appeal from a decision of the Minnesota Supreme Court rejecting a procedural due process challenge to Minnesota's proportionate share statute. That court had construed the state law to permit the state courts to "determine the validity and proper amount of the [proportionate] share fee"

C. *The Errors in the Court of Appeals' Rationale.* The court below faulted the CTU escrow procedure in three respects; as we proceed to show, that court's reasoning cannot withstand analysis.

1. The court of appeals first voiced concern that "[t]he union has made no commitment to continue to place [objectors'] fees in escrow." App. A-14. If by that observation that court meant to question the Union's intention to continue the escrow system, the observation is wholly unwarranted: CTU, as its counsel made plain to the court below, is committed to the escrow system the Union itself developed and has every intention of maintaining that system.[14] If, instead, the appellate court's point was that CTU is not legally obligated to continue the escrow system, the observation is true but irrelevant: the procedure for effectuating proportionate share payments must be judged as the procedure exists at present, and cannot be held unconstitutional (with the resulting shift to the Board of Education of expensive, time-consuming, supervisory obligations) because of the theoretical possibility

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and to "enjoin the use of the disputed fee until the exclusive representative establishes to the satisfaction of the district court the validity and correctness of the fee"; the Minnesota State Court held, however, that "in the absence of unusual circumstances, the hearing and final judicial determination of the fee's validity may follow the actual withholding of the [proportionate] share fee from the employee's paycheck." 307 Minn. 96, 239 N.W.2d 437 (1976), *vacated and remanded,* 429 U.S. 880, *reinstated on remand,* 316 N.W.2d 551, *appeal dismissed,* 459 U.S. 802. Thus, as construed, the Minnesota statute created a system less protective of objectors than the one at issue here, in which proportionate share fees in the full amount of union dues were collected from objectors but were not used *pendente lite.* This Court dismissed the objector's appeal challenging the constitutionality of the Minnesota law on the ground that the appeal did not present a substantial federal question.

[14] Indeed, CTU's counsel stated below that the Union would consent to a modification of the district court's judgment to mandate the escrow system.

that CTU will in the future adopt some *other* procedure that might not pass constitutional muster.

Ironically, the court of appeals made this very point elsewhere in its opinion. In rejecting the employee-respondents' request that the court below invalidate the Illinois statute because the statute "fails to set forth constitutionally adequate procedures—or indeed any procedures—for determining dissenters' objections," App. A-15, the court of appeals responded:

> We do not understand this argument. When the Board, pursuant to our decision, creates such procedures, the plaintiffs will not be able to complain just because these procedures are not written into a statute. [App. A-15]

2. The appellate court's principal objection to CTU's escrow procedure was that the terms of the escrow are "left entirely up to the union"; that court thought this significant because "[t]he union might decide, for example, to forego a high interest rate in order to punish dissenters (even though it would be punishing itself at the same time)." App. A-14 to A-15. But this objection simply does not implicate any First Amendment interest. As we have stressed, this Court has made clear that the constitutional issues raised by proportionate share payment provisions arise not from the collection of those payments but from the use of the objector's money for certain proscribed purposes; if the payments were used only for permissible purposes, the objector "would have no grievance at all." PP. 10-14 *supra.* Because that is so, the financial terms under which a proportionate share payment is held in escrow are of no constitutional significance; what is critical is that the money is in escrow and therefore is not available to the union for its use.[15] In-

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[15] The lower court implied that to the extent an objector is temporarily deprived of the use of his money, a First Amendment issue may be created because the escrowed money is "not available to

deed, even if an objector's escrow account did not generate any interest at all, escrowing 100% of the objector's proportionate share payment still would suffice to protect fully the First Amendment right of objectors as identified in *Abood* and *Ellis*: the right not to have their funds used, even temporarily, for "improper" purposes.

3. Although the court of appeals did not fault any other aspect of the CTU escrow arrangement as such, that court deemed inadequate the internal appeals procedure CTU established for reviewing objectors' challenges to the calculation of the proportionate share payment. *See* App. A-9 to A-12. Proceeding on the apparent premise that, under the CTU procedure, the decision reached through the internal union appeals process is determinative of the amount of the proportionate share payment that is released from escrow and made available to the Union for its use, the court below evaluated that process standing alone to determine if, in that court's judgment, the procedure provides adequate safeguards against temporary subsidization of union activities which objectors may not be required to support. The court below found the procedure wanting and "suggest[ed] that the constitutional minimum would be fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision." App. A-12 to A-13.

The court of appeals' apparent premise is wrong as a matter of fact: under the CTU escrow arrangement, an

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[the objector] to support other political activities." App. A-6. By this reasoning, every property deprivation would constitute a First Amendment violation as well. All of the Court's cases involving property deprivations, from *Goldberg v. Kelly*, 397 U.S. 254 (1970), on, make clear that this is not the law.

objector's proportionate share payment is *not* released from escrow at the culmination of the internal proceeding but is held in escrow until the objector has, if he/she wishes, secured a final *judicial* determination as to whether the amount of the payment comports with Illinois law and the Constitution. P. 5, *supra*. Thus, the question the appellate court seemingly addressed—the constitutionality of a system in which a union obtains the use of an objector's money based on a (union-retained) arbitrator's determination that the objector is being charged only for matters to which the objector may be required to contribute—is simply not presented in this case. Under the CTU system, the objector has the option of a judicial determination and the Union does not receive the use of the objector's money until such a determination has been rendered.

There can be no doubt that *this* escrow procedure satisfies every conceivable requirement of due process and that, at least in this context, there is no merit in the court of appeal's "suggestion" that the Constitution requires an "administrative hearing" followed by judicial review. It is, after all, the very essence of the judicial function—for state judges no less than for state administrative agencies—to provide fair and impartial hearings that comport with the requirements of due process. An administrative process would add nothing to the judicial procedure that is available to objecting fee payers as a matter of state law, and would be expensive and time consuming for the Board of Education to operate.

Indeed, in at least one respect, the administrative process the court of appeals contemplated would be inimical to the very point of the proportionate share payment requirement, *viz.*, to further the State's overriding interest in labor peace. *See* p. 11, *supra*. Under that court's "suggested" procedure, the Board of Education would be placed in the position of judge *vis-à-vis* the CTU, and

would be required to decide which of the Union's expenditures are properly chargeable to fee payers as part of the Union's cost of "collective bargaining" and "contract administration" and which are not. Placing the Board in that position would be bad for the Board, for the Union and for the collective bargaining system created to promote labor peace.

"The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.'" *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 394 (1982). From their separate conception of self-interest, each party determines its own needs and desires and then, through a process of persuasion, compromise and economic force, the parties arrive at an agreement which each concludes is acceptable. That entire process would be undermined if the independence and autonomy of either party in dealing with the other were not secure. And that is precisely what would happen if either party were placed in the role of overseer of the other.

Thus, the procedure the court below "suggested" is neither constitutionally necessary to protect the rights of objectors, nor practically desirable given the aims of the Illinois law.

D. *The Validity of Systems That Provide For Less Than 100% Escrow.* What we have just shown is, of course, sufficient to dispose of this case. But because of the breadth of the lower court's opinion—and in order to avoid any possible misunderstanding—we think it useful to venture a few more words to set forth our view that the escrow arrangement adopted by CTU, while constitutionally sufficient, is *not* constitutionally required to satisfy the requirements of the First and Fourteenth Amendments.

The starting point for our analysis is this Court's teaching that, "[d]ue process, unlike some legal rules, is not a

technical concept with a fixed content unrelated to time, place and circumstances. '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). It would be the antithesis of this teaching to conclude that the *only* system that satisfies the requirements of due process is the one adopted by CTU.

In particular, the CTU 100% escrow system has an obvious drawback: the system cuts deeply against the governmental interests that justify requiring proportionate share payments and against the constitutional interests of non-objecting employees. Until all litigation is resolved, that system deprives the Union of any contributions from objectors, and thus places the entire burden of supporting the Union's collective bargaining activities on the nonobjectors. Depending on the number of objectors and the amounts involved, this "might well interfere with the . . . unions' performance of those functions and duties which the [law] places upon them." *Street*, 367 U.S. at 771. And by imposing extra burdens on nonobjectors to support collective bargaining activity, the 100% escrow system means that "union members who do wish part of their dues to be used for political purposes" are deprived of their "right to associate to that end," *Abood*, 431 U.S. at 238. Indeed, it is for precisely these reasons that this Court has held that "an injunction relieving dissenting employees of all obligation to pay . . . [is] impermissible." *Railway Clerks v. Allen*, 373 U.S. 103, 110 (1963); *see Street*, 367 U.S. at 771.

A number of unions have, therefore, adopted some variant of an alternative system in which, as in the CTU system, an initial determination is made by the union of the proportion of its income that in past years has been expended on activities for which objectors cannot be charged. The objector is then required to pay a reduced amount of dues no part of which is placed in escrow or, alternatively, the objector pays the full amount of dues and

the union's calculation is used to determine the amount of the payment that is to be placed in escrow (often with an extra amount to provide a margin for error).[16] In *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, —— U.S. ——, 53 L.W. 3599 (1985), the Third Circuit recently upheld several such systems.[17]

Ellis indicates, albeit in general terms, that approaches of this type are constitutionally acceptable. *See* p. 16, *supra* ("readily available alternatives, such as advance reduction of dues and/or interest bearing escrow accounts . . . place only the slightest additional burden, if any, on the union"). Moreover, subsequent to *Ellis*, this Court has on two occasions dismissed for want of a substantial federal question appeals challenging advance reduction procedures of the type just described. *Jibson v. White Cloud Education Association*, —— U.S. ——, 53 L.W. 3268 (1984), *dismissing appeal from* 101 Mich. App. 309, 300 N.W.2d 551; *Kempner v. Dearborn Local 2077*, —— U.S. ——, 53 L.W. 3323 (1984), *dismissing appeal from* 126 Mich. App. 452, 337 N.W.2d 354.[18]

These decisions recognize that advance reduction procedures satisfy the "objective" stated in *Abood*: "devis[ing] a way of preventing compulsory subsidization

[16] The reason that some unions, after calculating the proportion of the prior year's expenditures on nonchargeable activities, do not reduce an objector's dues by that proportion but rather place that portion of an objector's payments into escrow is because of a concern that if, during the year for which a payment is being made the union increases the portion of its expenditures on chargeable activities, the union's right to collect any additional money from the objector will be impaired.

[17] *See also San Jose Teachers Association v. Superior Court*, 38 Cal. 3d 839, 700 P.2d 1252 (1985); *Board of Education v. Kramer*, —— A.2d ——, 119 LRRM 3354 (N.J. Sup. Ct., June 25, 1985).

[18] Summary decisions by this Court are, of course, adjudications on the merits binding on the lower court. *E.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975).

of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 431 U.S. at 237. The procedures just noted protect the objector's constitutional right not to subsidize ideological activity by either relieving the objector of the obligation to pay that portion of union dues that, based on experience, can be expected to go for "ideological activity" or by placing that portion of an objector's dues in escrow until a final determination is made as to how that union has in fact expended its income. But these procedures do not deprive the Union of the funds needed to support activity germane to collective bargaining *pendente lite*.

To be sure, there is some risk in any advance reduction system that the union may err in its calculation of the percentage of its income that in the prior year was devoted to nonchargeable activity or that because of contingencies that percentage may increase. That risk can be minimized—indeed can be reduced to virtual insignificance—if the union adds to the advance reduction or to the escrowed amount a comfortable margin for error.[19] And at least once that is done, the risk, or more precisely the theoretical possibility, that absent a 100% escrow some of the objectors' money could temporarily be used

[19] The risk of miscalculation can also be minimized if a union retains a neutral (such as an independent auditor or impartial labor arbitrator) to make the calculations. Because any decision that a neutral makes will be subject to *de novo* review by the courts which ultimately must decide whether the objector is being required to finance activities which he is privileged not to support, the appellate court's concern over the independence of a union-retained neutral is misplaced: the Due Process clause does not require that the *initial* decision-maker be wholly independent so long as the final decision-maker is. *Cf. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16 (1978) (requiring initial hearing before "designated employee" of utility company before termination of utility service); *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (hearing before "the disciplinarian" prior to temporary suspension of student).

for impermissible purposes would be far outweighed by the *certainty* that denying the union any part of the objectors' money would burden the nonobjectors by requiring them, temporarily, to shoulder the full cost of the union's collective bargaining activities—activities which, as even the court below acknowledged, account for "most of the expenditures that a union makes," App. A-5. Thus, the 100% escrow does not achieve an "appropriate reconciliation between majority and dissenting interests"; in the name of protecting objectors, it allows "undue impingement" on the interests of the majority. *Street*, 367 U.S. at 771.

This Court's precedents recognize as much. In *Railway Clerks v. Allen*, *supra*, the Court stated that "[a]bsolute precision in the calculation of [the] proportion [of chargeable to nonchargeable expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." 373 U.S. at 122. And this ruling in turn reflects the general principle that

> [t]he Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determination. . . . [W]hen prompt, post-deprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonable reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be. [*Mackey v. Montrym*, 443 U.S. 1, 13 (1979).]

Thus if the issue were presented here—and because of the CTU 100% escrow system it is not—the Court should reaffirm the teaching of *Ellis* and its progeny that advance reduction systems without a 100% escrow also satisfy the requirements of the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded to that court with instructions to affirm the district court's judgment dismissing the complaint.

Respectfully submitted,

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v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF THE PETITIONERS AND THE RESPONDENTS SUPPORTING PETITIONERS

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ARGUMENT

A. Introduction

The brief of the individual respondents (hereinafter "respondents") seeks to defend the judgment of the court below without in any way defending (or even mentioning) that court's reasons for entering that judgment.[1] And to cover their tracks respondents excoriate the Union (and its officials) and the Board of Education (and its officials) (hereinafter collectively referred to as "petitioners")—who together oppose the judgment entered by the court below—for addressing that court's reasoning and for fail-

[1] Indeed, at various points in their brief, respondents even appear to request relief that goes beyond the judgment below. *See, e.g.*, Resp. Br. at 8 n.13 (attacking the constitutionality of the Illinois statute); *id.* at 34-38 (requesting this Court "to instruct the parties and the lower courts as to the criteria of . . . a [required] procedure"). Having failed to cross-petition, respondents' arguments in these regards are now inadmissible. *E.g., TWA v. Thurston*, —— U.S. ——, 53 L.W. 4024, 4026 n.14 (Jan. 8, 1985).

ing in our opening brief to anticipate and address the arguments respondents now press.

The court of appeals' rationale for invalidating petitioners' procedures for effecting proportionate share payments rests on the proposition that "forcing a public employee to support a union . . . deprive[s] him of 'liberty' within the meaning of the Fourteenth Amendment and therefore requires the employer to give him due process of law in the sense of fair procedure." App. A-6. That court went on to explain that the "liberty in question is freedom of association," and more particularly, the "negative . . . dimension" of that freedom, *viz.*, the " 'freedom not to associate.' " App. A-7. And the court of appeals concluded:

> True, freedom of association, whether positive or negative, is no more absolute than the other liberties that the due process clause protects against deprivation without due process of law. But the fact that it enjoys the procedural protections capsulized in the term "due process" means that the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go no further than is necessary to prevent the individual from taking a free ride on an entity that . . . is providing services to him as his collective bargaining representative. [App. A-7 to A-8]

In opposing the petition for certiorari, respondents defended the judgment below on like grounds. Respondents claimed that the appellate court had

> faithfully followed *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977),] in holding that any proportionate share payment scheme infringes on non-union employees' "liberty" (specifically their First Amendment freedom of association) but that this infringement is constitutional if the union uses the payments to defray its collective bargaining expenses. The Court of Appeals then applied this substantive teaching of *Abood* to the procedural-due-process context, holding (unexceptionally) that the admitted deprivation of employees' "liberty" is constitutional only if the State has mandated procedures that guarantee that the payments will, in fact and law, subsidize the union's collective-bargaining activities alone. [Resp. Br. in Opp. at 5-6]

Given the court of appeals' theory and respondents' defense of that theory, in our opening brief we demonstrated that the deprivation of liberty with which the court below was concerned occurs, if at all, not as a result of the *collection* of proportionate share payments but as a result of the *expenditure* of those payments for certain purposes. We further demonstrated that petitioners' 100% escrow system necessarily assures that respondents will not be deprived of that liberty interest without due process because under petitioners' system the entirety of an objector's payment is placed in escrow and *before any expenditure of that money is permitted respondents have the right to a full evidentiary hearing* before either an arbitrator (pursuant to CTU's appeals procedure) or the state courts exercising their general jurisdiction. *See* Pet. Br. at 16-19.

Respondents' brief on the merits makes no attempt to respond to the analysis in our opening brief or to defend the reasoning of the court of appeals. Instead, respondents shift ground entirely, arguing that what triggers the application of due process here is *not* a threatened deprivation of "liberty"—*viz.*, a compelled association beyond that permitted by the Constitution—but rather a deprivation of property, *viz.*, the loss of the use of the money collected from the objector, a sum that cannot exceed $16.48 a month during the ten-month academic year. And respondents argue that while petitioners' procedures may suffice to protect respondents' rights of free speech and free association, the Constitution requires *far more* in the way of due process to adequately protect respondents' *property* rights. Respondents put the argument this way:

Because CTU might hold the "proportionate-share payments" in "escrow" until some court eventually determines how much CTU is entitled to spend, say the Board, and the CTU, "there is no risk that objectors will be deprived of their First Amendment liberty without Due Process." But precisely because the Board and CTU have garnished the monies from the teachers' wages and placed them in CTU's "escrow" account without a *pre*-garnishment hearing and then relegated the teachers to whatever redress a later state-court tort action may (or may not) provide, the "escrow" guarantees that the teachers are deprived of their property—the interim possession and use of their own wages—without due process. That is, *rather than obviating the "risk" of a due-process violation, the "escrow" constitutes that violation. That the "escrow" may theoretically forfend violations of the teachers' First Amendment rights is praiseworthy, but irrelevant* even if true in practice. For the right to procedural due process does not depend upon a deprivation of property also abiding the victims' First Amendment freedoms.

> [Resp. Br. at 29; emphasis on penultimate sentence added]

Since, according to respondents, their new-found theory —while not embraced by the court below—is "compellingly obvious[]," Resp. Br. at 13, it follows that our opening brief, addressed to the court of appeals' theory, "argues an imaginary case," *id.*, and is, indeed, "a coldly calculated study in misrepresentation," *id.* at 10.

Respondents' present theory is neither compelling nor obvious; rather, that theory is as insubstantial as the theory of the court below which respondents once championed and now rightly abandon.

B. The Agency Fee Precedents

At the threshold, it bears emphasis that respondents' present argument flies in the face of, and would uproot, fundamental principles established by this Court in its decisions involving the lawfulness of union security agreements.

For example, for almost twenty-five years, since *Machinists v. Street*, 367 U.S. 740, 771 (1961), it has been settled that "[r]estraining the collection of all funds from [objecting employees] sweeps too broadly" and "might well interfere with the . . . unions' performance of those functions and duties which the [labor laws] places upon them to attain its goal of stability." The Court reaffirmed that holding in *Railway Clerks v. Allen*, 373 U.S. 103, 110 (1963) ("an injunction relieving dissenting employees of all obligation to pay monies due under a [union security] agreement was impermissible"), and again in *Abood v. Detroit Board of Education*, 431 U.S. 209, 238 (1977). Yet the import of respondents' present argument is that if an objector invokes property rights rather than "merely" First Amendment rights a union is precluded from collecting even a single penny from that objector unless and until the union has "secure[d] the appropriate state agency's *certified final judgment* that the requested payments are lawful." Resp. Br. at 36 (emphasis added).[2]

Similarly, just two years ago, in *Ellis v. Railway Clerks*, —— U.S. ——, 52 L.W. 4499, 4501 (April 25, 1984), this Court, in holding that a union is not permitted to exact full union dues from objectors and then rebate the portion attributable to activities the objectors may not be required to support, concluded that there are "readily available" and "acceptable alternatives" to such a rebate approach, *"such as advance reduction of dues and/or interest bearing escrow accounts*, that place only the slightest additional burden, if any, on the union." Emphasis added. Yet respondents now maintain that

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[2] Respondents apparently would go even further, and require such a hearing and final judgment before a union may collect a proportionate share payment from *any* non-member, even one who has not made any objection. *See* Resp. Br. at 3. This, of course, effectively would overturn the Court's repeated holding that "dissent is not to be presumed—it must affirmatively be made known to the Union by the dissenting employee." *Street*, 367 U.S. at 774; *Allen*, 373 U.S. at 110; *Abood*, 431 U.S. at 238.

wherever an objector asserts a property right these procedures automatically cease to be constitutionally "acceptable." *See* Resp. Br. at 12-13 (discussing the foregoing portion of *Ellis*).

Respondents would avoid the force of this Court's union security cases from *Street* to *Ellis* on the ground that none of those cases "raise[d] a procedural-due process issue." Resp. Br. at 13. But that theory does not have even surface plausibility with regard to this Court's summary decision in *Threlkeld v. Robbinsdale Federation of Teachers*, 459 U.S. 802 (1982), *dismissing appeal from* 307 Minn. 976, 239 N.W. 2d 437 (1976) and 316 N.W.2d 551 (1982). In *Threlkeld* the very argument respondents make here was advanced and *rejected*. The "sole issue" before the court in *Threlkeld* was whether the Minnesota "'fair share' statute deprives an individual of property without providing procedural due process," 239 N.W.2d at 439. Plaintiffs argued there, as respondents argue here, that "an individual's wages are a 'specialized type of property' and that, under *Sniadach* [*v. Family Finance Corp.*, 395 U.S. 337 (1969)], an individual must be accorded a prior hearing before deductions may be made from his wages," *id.* at 442. The Minnesota Supreme Court rejected plaintiffs' contention as follows:

> A prior hearing is not the *sine qua non* of procedural due process since "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1984). Again, it must be stressed that the procedural protection to which the individual is constitutionally entitled depends on the balancing of the interests in each particular case. . . . As shown herein, the individual property interest in this case is of a much lesser magnitude than was involved in [*Sniadach* and its progeny] and the state's interest in the collection of the fair share fee is clearly more substantial . . . Consequently, since in the instant case the individual's interest is less significant and the state's interest is more substantial, the demands of procedural due process are correspondingly reduced. [*Id.* at 444-45]

The plaintiffs in *Threlkeld*—represented by the same counsel who represents respondents in the instant case—appealed to this Court, raising the procedural due process issue; the *Thelkeld* plaintiffs argued in their jurisdictional statement that "even if First Amendment freedoms are not involved, a seizure of property under color of statute without a prior hearing is unconstitutional under the Due Process Clause," J.S. No. 81-2403 at 19-20.[3] As noted, this Court dismissed that appeal for want of a substantial federal question.

As we proceed to show, the Minnesota Supreme Court's holding in *Threlkeld*, which this Court concluded did not so much as raise a substantial federal question, is as sound on full consideration as on summary consideration.

C. The Due Process Cases

1. What is most remarkable about respondents' extended exegesis into due process—and into the eleven "element[s]" that according to respondents are inherent in the concept of due process, Resp. Br. at 26—is the extent to which respondents systematically ignore this Court's teachings. For while respondents would distill due process into a set of fixed rules, "[i]t has been said so often by this Court and others as not to require citations of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Indeed, "[t]he very nature of due process negates any concept of

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[3] The plaintiffs in *Threlkeld* listed nine constitutional defects in the procedures at issue there, J.S. No. 81-2403 at 20; those nine defects are almost verbatim the same as defects 1-8 and 10 listed in their present submission, *see* Resp. Br. at 4-5. Apparently in the intervening five years counsel for respondents has discovered two additional requirements of due process.

inflexible procedures universally applicable to every imaginable situation," for due process, " 'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' " *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1961).

Recognizing this—and recognizing, too, that "the interpretation and application of the Due Process Clause are intensely practical matters," *Goss v. Lopez*, 419 U.S. 565, 578 (1975)—the Court, in *Mathews v. Eldridge*, 424 U.S. 319 (1976), while eschewing a fixed mechanical formula, announced a flexible generalized method of approach for determining, in a particular case, what due process requires. The *Eldridge* Court held:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. [424 U.S. at 334]

In the ten years since *Eldridge* was decided, this Court has consistently followed this approach in due process cases, most recently at the close of last Term in *Walters v. National Association of Radiation Survivors*, —— U.S. ——, 53 L.W. 4947 (June 29, 1985), where the Court stated:

> Our decisions establish that "due process" is a flexible concept—that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur. In defining the process necessary to ensure "fundamental fairness" we have recognized that the Clause does not require that "the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error," and in addition we have emphasized that the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard. [53 L.W. at 4951-52.]

Respondents do not even mention—let alone treat with—the *Eldridge* analysis.[4] Instead, proceeding almost as if *Eldridge* had not been decided, and relying principally on pre-*Eldridge* cases, respondents assert that except in " 'extraordinary,' 'truly unusual,' and 'limited' instances," the " 'minimum procedural safeguards,' " required by due process "include[] a *pre*-deprivation hearing." Resp. Br. at 14, 15 (emphasis in original).

Respondents' assertion is not even a fair statement of the pre-*Eldridge* law; as this Court stated two years before *Eldridge*, "The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity given for ultimate judicial determination of liability is adequate.' " *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974). And respondents' assertion is even wider of the mark with respect to the post-*Eldridge* cases, for those cases consistently "reject[] the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property," and the post-*Eldridge* cases teach—or more precisely reaffirm—that "post-deprivation remedies made available by the State can satisfy the Due Process Clause." *Parratt v. Taylor*, 451 U.S. 527, 540, 538 (1981) (emphasis in original). Indeed, subsequent to *Eldridge* the Court, on at least six

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[4] Respondents not only fail to address, in terms, the *Eldridge* factors but actually reject the relevance of at least two of those factors in the course of their brief. *See* Resp. Br. at 13 (due process requirements not affected by fact that "interest in possession and use is arguably not 'weighty' "); *id.* at 29 ("due-process rights to a prior hearing do not depend on the likelihood that [the complaining party] will prevail at such a hearing").

occasions, has sustained the constitutionality of a post-deprivation hearing absent any predeprivation process. *Hewitt v. Helms*, 459 U.S. 460 (1983); *Parratt v. Taylor*, *supra*; *Mackey v. Montrym*, 443 U.S. 1 (1979); *Barry v. Barchi*, 443 U.S. 55 (1979); *Dixon v. Love*, 431 U.S. 105 (1977); *Ingraham v. Wright*, 430 U.S. 651 (1977).[5] "In only one case, *Goldberg v. Kelly*, 397 U.S. 284 (1970) has the Court required a full adversarial evidentiary hearing prior to adverse governmental action." *Cleveland Board of Education v. Loudermill*, —— U.S. ——, 53 L.W. 4306, 4309 (March 19, 1985).

With this background in mind, we turn to an analysis of the *Eldridge* factors as applied to the problem presented by this case. As we show, a review of those factors demonstrates how inapposite are the purely private wage-garnishment and replevin cases on which respondents principally rely, and establishes that in this case it is the "usual rule" stated in *Mitchell v. W.T. Grant Co.*, *supra*, that applies: " 'mere postponement of the judicial inquiry is not a denial of due process' " because " 'the opportunity given for ultimate judicial determination of liability is adequate.' " 416 U.S. at 611.

2. (a) *"The Private Interest."*—Simply stated, here, as in *Hewitt v. Helms*, *supra*, 459 U.S. at 473, "respondents' private interest is not one of great consequence."[5] What is at stake for these respondents—each of whom, as a teacher covered by the collective bargaining agreement negotiated by CTU earns from $13,770 to $36,236 per year, R. 45, Def. Ex 1, pp. 122-25—is the payment of $164.80 in proportionate share fees per year. Moreover, if, and to the extent that, respondents are wrongfully deprived of any part of that sum, respondents will receive the money back from the escrow fund in which the objecting employees' proportionate share payments

[5] *See also Miller v. Chicago*, 774 F.2d 188 (7th Cir. 1985), and *Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983) (Posner, J.).

are placed; thus, at most, respondents are deprived only of the temporary use of that money.

Even the foregoing overstates respondents' interest in this case. For although respondents pretend otherwise, there is no possibility that CTU is "entitled to no part of the seized wages." Resp. Br. at 12.[6] By operation of state law and the collective bargaining agreement between CTU and the Board, all members of the bargaining unit are legally obligated "to pay their proportionate share of the cost of the collective bargaining and contract administration measured by the amount of dues uniformly required by members." Thus, respondents may not be suffering any wrongful deprivation at all. At most, respondents' interest amounts to the temporary loss of the use of a *portion* of $16.48 per month during the 10-month academic year. And if it is determined that $16.48 per month is more than respondents' proportionate share of the cost of collective bargaining and contract administration, respondents will be compensated for the temporary lost use of whatever excess was collected from them through the payment of interest on that sum.

(b) *"The Risk of an Erroneous Deprivation."*—The second *Eldridge* factor concerns "the risk of an erroneous deprivation . . . through the procedures used, and the

[6] Respondents assert that the record does not establish "that any supposed 'benefits' the 'collective bargaining agreement and its administration' actually conferred on some or all 'employees in the bargaining unit' were such *constitutionally sanctioned* 'collective-bargaining benefits' as might support imposition of a "proportionate share payment on nonunion employees under the *Abood* doctrine." Resp. Br. at 2 (emphasis in original). This is sheer sophistry, as the district court's uncontested findings establish:

> All employees . . . whether or not members of the union, are fully covered by the terms of the collective bargaining agreement between CTU and the Board. Until December, 1982, the entire cost of collective bargaining and contract administration was underwritten by CTU members through their union dues. *Thus, those teachers and other employees within the bargaining unit who chose not to join CTU received the benefits of CTU's collective bargaining efforts* without contributing financially to the costs of such efforts. [App. A-26; emphasis added]

probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 334. For two independent reasons, the risk of an erroneous deprivation here does not place a heavy weight on the scales.

First, in "the generality of [agency fee] cases"—and *Eldridge* teaches that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exception," 424 U.S. at 344—the likelihood of an erroneous deprivation is small. In any year, before withholding of proportionate share payments begins, CTU makes a calculation of the proportion of its expenditures that in the immediately prior year were not devoted to "the collective bargaining process and contract administration," and makes a compensating *advance reduction* from its normal dues in fixing the proportionate share payment. The district court found that CTU's first year's calculation—the only calculation before the court—was based upon "a thorough analysis of [CTU's] financial records," App. A-51; was made "in good faith compliance with both the statute and [the] agreements with the Board," *id.*; and produced a "carefully documented" determination of the amount of the proportionate share payment, A-45.[7]

Moreover, as the district also found, the risk of error is appreciable only in the first year since in that year "many of CTU's basic judgments as to the political nature of certain expenditures are subject to challenge." App. A-52. Once those judgments are either affirmed or reversed—and a final determination is made as to what percentage of CTU's income was expended on collective

[7] Because the money of objectors is placed, *in toto*, in an interest-bearing escrow account, CTU has no conceivable incentive to seek too much from objectors; to the contrary, CTU's interest lies in avoiding litigation over the amount of the proportionate share payment which, if it were to occur, would delay the time at which CTU would be able to use respondents' money and would cost CTU more than the union would receive from objectors. Thus CTU has every reason to do a fair and noncontroversial calculation.

bargaining and contract administartion in the base year —"*the margin of error in fair share calculations should shrink to minimal dimensions in the future years*," *id.* (emphasis added), as all that will be required will be the application of settled rules and determination to CTU's financial records.[8]

Second, as the district court further found, to the extent any error occurs in calculating proportionate share payments—especially after the first year—"such errors should require only minor refinement of the fair share fee." App. A-51. This is because the Illinois legislature has provided an entirely rational benchmark—and a ceiling—for determining the amount of the proportionate share payments that an objector is required to make: such payments are to be "measured by the amount of dues uniformly required of members." As the court of appeals recognized, "most of the expenditures that a union makes are germane to its responsibilities in the collective bargaining process and thus do not violate the First Amendment even when the money expended comes in part from dissenting employees." App. A-5. This recognition accords with this Court's observation that performing the functions of an exclusive bargaining representative "entails the expenditure of considerable funds." *Street*, 367 U.S. at 760; *see also Abood*, 431 U.S. at 221.

Thus, in the generality of cases, the procedure here offers "substantial assurance that the [objector's] inter-

[8] In the first year of the proportionate share agreement, nonmembers were not required to make proportionate share payments for the first three months as CTU, prior to implementing the proportionate share payment requirement, provided notice of, and information about, the proportionate payment system to the employees in the bargaining unit. Consequently, objectors ultimately paid 70% of dues for that first year, even though CTU calculated that over 95% of its expenditures were for activities germane to collective bargaining. *See* R. 45, Stipulation of Facts ¶ 20. This leaves a substantial margain for error to have occurred without causing any injury to respondents.

est is not being baselessly compromised." *Barry v. Barchi*, *supra*, 443 U.S. at 65.[9]

(c) *"The Government's Interest."*—Weighted against the minimal private property interest at stake here (and the at least equally small risk of an erroneous deprivation of even that minimal interest) is the government's interest in "the function involved." *Eldridge*, 424 U.S. at

[9] Of course, whether CTU erred in the first-year determinations made in fixing the amount of the proportionate share payment (and if so to what extent) ultimately will depend on how narrowly or broadly the Illinois courts define the category of expenditures for which unions may, under the Illinois statute, charge objecting employees, and how narrowly or broadly this Court draws the constitutional limitations on the activities towards which objectors may be required to contribute. Because we do not believe that the resolution of the procedural due process issue posed here is in any way dependent upon the decision of those substantive issues—and because the Court does not have the benefit of a state-court determination with respect to the threshold issues of state law—we do not think it necessary or appropriate for the Court in this case to address further the 'difficult problems in drawing [constitutional] lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining for which such compulsion is prohibited." *Abood*, 431 U.S. at 236. Nonetheless, we feel compelled to note our response to respondents' argument with respect to that issue.

Respondents assert that objectors have a constitutional privilege not to contribute to non-political, non-ideological union activities unrelated to collective bargaining because the "governmental interest that this Court says justifies . . . forced payment of 'fair share fees' is . . . only an interest in reimbursing unions for demonstrably 'collective-bargaining services," Resp. Br. at 12 n.19; this was the lower court's view as well, App. A-8 to A-9. But as we explained in our opening brief at 15 n.9, *Ellis* teaches, logically enough, that the question of "governmental interest" arises only after it has been shown that a compelled contribution for a particular activity implicates an "*additional* interference with the First Amendment interests of objecting employees," beyond the interference "already countenanced." 52 L.W. at 4504 (emphasis added). By definition, compelled support for non-political, non-ideological union activity does *not* implicate such an interest—the objectors' only complaint is that it is *union* activities the objector is required to support, *see id.*—and thus there is no First Amendment privilege to refuse to contribute to such activities.

334. That interest has been clearly identified in the decisions of this Court: it is nothing less than the "governmental interest in industrial peace," *Ellis*, 52 L.W. at 4504.

That governmental interest would be gravely undermined if, as respondents urge, CTU and the Board could not begin to collect proportionate-share payments from objectors until after the Board has "secure[d] the appropriate state agency's final judgment that the requested payments are lawful." Resp. Br. at 36.[10] Such a rule would mean that until a "final judgment" is secured objectors would be able to take a "free ride" on their fellow employees. During the period of that free ride—and the period could be considerable because deferring the collection of proportionate share payments would create an "incentive to delay," *Mackay v. Montrym*, *supra*, 443 U.S. at 18, on the part of objectors—the state's fundamental purpose in requiring proportionate-share payments, namely to alleviate the tensions and hostilities among employees that free-ridership inevitably engenders, would be completely frustrated.

Precluding the collection of proportionate share payments until after a final judgment is obtained could disrupt the governmental interests in other ways as well. Such a rule "might well interfere with the . . . unions' performance of those functions and duties which the [labor law] places upon them to attain its goal of stability in the industry," *Street*, 367 U.S. at 771; *see also Allen*, 373 U.S. at 110 ("the important function of labor organizations . . . [could] be unduly impaired"). And precluding collection of proportionate share payments *pendente lite* would increase the financial burdens placed on non-objectors during that period and thereby would deprive "union

[10] Even respondents now concede that, contrary to the decision of the court below, App. A-12 to A-13, "the Board is obviously *not* a suitable state agency to hold hearings on the validity of 'proportionate-share payments.'" Resp. Br. at 34 (emphasis in original); *see* Pet. Br. at 23-24.

members who do wish part of their dues to be used for political purposes" of their right "to associate to that end." *Abood*, 431 U.S. at 238.[11]

This Court has made clear that these are "important government interests," *Abood*, 431 U.S. at 225; indeed, they are sufficiently weighty to justify "a significant infringement on First Amendment rights," *Ellis*, 52 L.W.

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[11] Respondents argue that because CTU has chosen to provide objectors complete protection against any conceivable misuse of their money by escrowing 100% of the proportionate share payments from objectors *pendente lite*, there is no difference, from CTU's vantage point, between requiring a pre-collection and a post-collection hearing because in either case CTU does not gain the use of any of the objectors' money until after the hearing is completed. But permitting collection of proportionate share payments into an escrow account *pendente lite* assures that objectors will not be perceived as taking a free ride during the litigation period. Such collection also minimizes the "incentive to delay" objectors would have if there were no payment obligation until all hearings were concluded. And permitting pre-hearing collection guarantees that the objectors' money eventually will be available to CTU to the extent found permissible. In contrast, if collection were precluded until after a "final judgment" were obtained, CTU would then have to attempt to collect accrued debts, including debts from teachers who had left the employ of the School Board, once the amount of CTU's entitlement were determined.

Moreover, as already noted, due process rules are shaped by the "generality of cases, not the rare exception." P. 12 *supra*. In most cases, unions do not escrow 100% of proportionate share payments but escrow a lesser percentage tailored to a (generous) estimate of the proportion of union expenditures on activities that objectors cannot be required to support. *See* Pet. Br. at 24-28; Br. of the National Education Association As *Amicus Curiae* at 11-14. In such cases, a rule that precluded any collection until after all hearings were completed would directly interfere with the union's ability to expend objectors' funds for activities germane to collective bargaining. And it would be ironic, indeed, to hold that by proceeding with an abundance of caution at the outset and initially establishing the escrow amount at 100%, CTU became obligated to provide hearings before collecting any money from objectors, whereas had CTU adopted a system which allowed for immediate expenditure of a portion of objectors' monies, prehearing collection would have been permitted.

at 4504, *viz.*, to justify requiring objectors to support financially the collective bargaining activities of their bargaining representative notwithstanding the objectors' constitutional interest in refraining from such association. The Court has likewise made clear that although objectors do have a constitutional privilege not to support political or ideological activities unrelated to collective bargaining, protecting the governmental interests at stake requires that objectors "can be entitled to no relief until after final judgment in their favor is entered," *Allen*, 373 U.S. at 110. *See also Street*, 367 U.S. at 771. It follows *a fortiori* that the same governmental interests that outweigh these vital First Amendment concerns are substantial enough to outweigh respondents' relatively minor interest in not being temporarily deprived of the use of a relatively small sum of money, much—and perhaps all—of which, respondents are obligated to pay to the union in any event. In short, there can be no justification for precluding the collection of proportionate share payments until after a state agency renders "final judgment that the requested payments are lawful." P. 15 *supra*.

Nor do respondents here seek any lesser form of preliminary predeprivation process. In some—but by no means all—other contexts this Court has required preliminary process as an "initial check against mistaken decisions." *Cleveland Board of Education v. Loudermill*, *supra*, 53 L.W. at 4309.[12] But in those cases, the point of the preliminary process was to afford the property-holder an opportunity to "explain his version of the facts," *Goss v. Lopez*, *supra*, 419 U.S. at 382, in situations where the decision whether to terminate the individual's property interest would be based on the resolution of potentially conflicting accounts of a past event. Here, in contrast, the point of the process respondents seek is not to present evidence within their personal

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[12] *See also, e.g., Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978); *Morrisey v. Brewer*, *supra*; *North Georgia Finishing, Inc. v. Di-Chem Inc.*, 419 U.S. 601 (1975).

knowledge; respondents concede that "the only complete source of evidence" is the "officials, employees and organizational records of the CTU and its affiliates," Resp. Br. at 33. Rather respondents seek a hearing to test CTU's legal determinations as to which of its activities are germane to collective bargaining and which are not, and to test CTU's factual determination of the costs attributable to the germane activities. Thus, here, as in the numerous other instances in which the Court has held that predeprivation process is not required, *see* pp. 9-10 *supra*, the complaining party's claims are not ones that lend themselves to sensible exploration and resolution through an informal preliminary hearing, and requiring a full-fledged evidentiary hearing prior to the deprivation would gravely undermine the important governmental interests at stake in a way not justified by the minimal private interest involved.[13]

3. All of the foregoing considerations serve to distinguish the instant case from the cases on which respondents rely, principally *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972).

First, those cases—unlike this one—involved weighty private interests; *Sniadach*, for example, concerned a prejudgment garnishment in an amount equal to almost

[13] In arguing that the informal processes required in *Loudermill et al.*, do not make sense here, we hasten to add that we do not in any way endorse respondents' extravagant suggestion that what due process requires in this context is a hearing that is tantamount to a rate-making hearing of the type required by various federal statutes. *See* Resp. Br. at 36-38. Nothing in this Court's due process jurisprudence remotely supports that suggestion. And in its agency-fee cases, the Court has squarely held that "[a]bsolute precision . . . is not . . . to be expected" given "the difficult accounting problems that may arise." *Allen*, 373 U.S. at 122; *see also Abood*, 431 U.S. at 239-40 n.40. Indeed, the litigation costs of the type of rulemaking procedures respondents espouse would greatly dwarf the size of the proportionate share payments and ultimately would destroy the proportionate fee system, to respondents obvious delight but to the detriment of the governmental interests at stake.

seven weeks of wages. As the Court recognized, such garnishment "may as a practical matter drive a wage-earning family to the wall." 395 U.S. at 341-42.

Second, the risk of error in those cases likewise was high; in each the alleged debtor had potentially dispositive defenses and, indeed it was possible—in the *Sniadach* Court's view common—for fraudulent claims to be filed by supposed creditors. *See id.* at 341. That could occur in *Sniadach* and *Fuentes* because the alleged debt on which the garnishment or replevin was based resulted from a process to which the state was not a party. In contrast, here the obligation of objectors to make proportionate share payments is created by state law and by a collective bargaining agreement to which the Board is a party; the state law itself places a limit on the payment; and there is no doubt that respondents have an obligation to pay most if not all of what is being required of them.

Finally in *Sniadach* and *Fuentes*, precisely because what was involved was the collection of a private debt, the government had little if any independent interest in effecting a taking without any prehearing process. Here, in contrast, there is a strong interest in seeing to it that the obligations the government itself has created are satisfied; that governmental interest can be protected only by permitting pre-hearing collection.[14]

For all these reasons it is not *Sniadach* and *Fuentes* but *Eldridge* and its progeny that are controlling here. And *Eldridge* teaches that the procedures followed in this case in effecting the proportionate share payments meet the Constitution's due process requirements.

[14] Respondents thus defy this Court's repeated holdings in asserting that "the governmental interest in [proportionate share] payments (whatever it may be) does not significantly exceed the government's general interest in effectuating the collection of private creditors' valid claims from their private debtors." Resp. Br. at 32 n.68. Respondents' refusal to accept the significance of the governmental interests at stake is alone sufficient to impeach respondents' entire due-process analysis.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded to that court with instructions to affirm the district court's judgment dismissing the complaint.

Respectfully submitted,

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(5)

No. 84-1503

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, *et al.*,
Petitioners,

v.

ANNIE LEE HUDSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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This brief, *amicus curiae*, is filed by the National Education Association (NEA) with the consent of the parties, pursuant to the Rules of this Court.

INTEREST OF *AMICUS CURIAE*

NEA is a nationwide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of

affiliated organizations: it has as state affiliates an organization in each of the 50 states, the District of Columbia and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States.

One of the principal objectives of NEA and its affiliates is to secure improvements in the terms and conditions of employment of educational employees. Toward this end, they engage in collective bargaining pursuant to state public employee collective bargaining statutes, or, in the absence of express statutory authorization, pursuant to judicially sanctioned *ad hoc* arrangements agreed to between a particular affiliate and employer. Where permitted by state law, as in Illinois, NEA affiliates seek to include in their collective bargaining agreements agency shop provisions (*i.e.*, provisions which require employees in the bargaining unit who choose not to join the exclusive representative to pay a fee to it.)[1] Although holding that provisions of this type are permissible under the United States Constitution, the Court has established a basic limitation on the union's right to expend the compelled contributions that it receives: an exclusive representative may expend such fees, over objection, for activities that are "related to" collective bargaining, but the expenditure of fees for political and ideological activities that are not so related abridges the First Amendment rights of objecting fee payers.

Recognizing the difficulties that could be involved in judicial enforcement of the line between constitutionally chargeable and nonchargeable expenditures, the Court has encouraged unions to adopt voluntary procedures by which objectors would be afforded an internal union remedy. Although the narrow issue before the Court in this case is whether a particular type of internal union procedure is constitutional, the Court's decision is likely to have implications for all internal union procedures, including the procedure used by NEA. Accordingly, NEA has a substantial interest in the outcome.

[1] The precise terminology used to designate this type of cost-sharing arrangement varies from jurisdiction to jurisdiction. It is referred to as a "proportionate share payment" in Illinois, and as a "fair share fee," a "service fee," etc. in other jurisdictions. It is referred to most commonly as an "agency shop fee," and we use that designation here.

SUMMARY OF ARGUMENT

It is permissible under the Constitution for an exclusive representative to expend agency shop fees, over objection, for activities that are "related to" collective bargaining, but the expenditures of such fees for political and ideological activities that are not so related abridges the First Amendment rights of objectors. The Court has encouraged unions to adopt internal procedures for distinguishing between chargeable and nonchargeable expenditures, and has indicated that the objective of these procedures should be to protect the First Amendment right of objecting fee payers to refrain from financing nonchargeable activities without depriving the union of its right to collect and expend fees for activities that are related to collective bargaining. (Part A)

In *Ellis v. Railway Clerks*, 52 U.S.L.W. 4499 (April 25, 1984), the Court held that the internal union procedure at issue (*i.e.*, a "pure rebate system") was constitutionally impermissible, but identified two "acceptable alternatives," including interest-bearing escrow accounts. Given the constitutional interest at stake in *Ellis*, the Court must at the very least have intended to sanction a 100% escrow procedure such as that used by petitioners: since the objector's entire agency shop fee is kept in an escrow account until he or she has exhausted all avenues available to challenge the amount charged, the procedure eliminates *any* possibility that the union will be able "to commit dis-

senters' funds to improper uses even temporarily." *Ellis*, *supra*, 52 U.S.L.W. at 4501. But there is nothing in *Ellis* to suggest that a 100% escrow procedure is constitutionally necessary. To the contrary, both the logic and language of the Court's decision indicate that an escrow procedure pursuant to which an amount less than the objector's entire fee is placed in escrow likewise is constitutional. (Part B)

NEA has adopted a procedure of the latter type. This procedure, which uses an impartial arbitrator to determine the appropriate portion of the objector's fee that is to be placed in escrow, provides adequate protection against temporary misuse and is more responsive than is a 100% escrow procedure to the Court's concern that the union have timely access to that portion of the objector's fee that it is entitled to expend. The use of an arbitrator to distinguish in the first instance between chargeable and nonchargeable expenditures does not render the NEA procedure constitutionally unacceptable. There is nothing in this Court's decisions to suggest that a decisionmaker must be disqualified as impermissibly biased because he or she is selected and paid by the union, or that an arbitrator is for any other reason not qualified to make the categorization in question. (Part C)

ARGUMENT

THE 100% ESCROW PROCEDURE USED BY PETITIONERS IS CONSTITUTIONALLY SUFFICIENT, BUT NOT CONSTITUTIONALLY NECESSARY. A LESS THAN 100% ESCROW PROCEDURE, SUCH AS THAT USED BY NEA, ACCOMMODATES THE INTERESTS IDENTIFIED BY THE COURT IN AGENCY SHOP CASES

A. The Interests Identified by the Court in Agency Shop Cases

The Court's decisions establish that it is constitutional to require members of a bargaining unit, over their objection, to support activities of the exclusive representative that are related to collective bargaining, but that it abridges the First Amendment rights of objecting fee payers to require them to help finance political and ideological activities that are not so related. Whatever the proper line may be between chargeable and nonchargeable expenditures, some procedure is required to assure that objectors can be charged for the former, without infringing on their right to refrain from financing the latter. Recognizing the difficulties that could be involved in judicial enforcement of this line, the Court in *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 122, 124 (1963), "encourage[d] . . . unions to consider the adoption by their membership of some voluntary plan" for the "vindication of the rights and accommodation of interests here involved." The Court reaffirmed this position in *Abood v. Detroit Board of Education*, 431 U.S. 209, 240 (1977), noting that "it would be highly desirable for unions to adopt a 'voluntary plan by which dissenters would be afforded an internal union remedy.' "

The Court has identified several interests that must be accommodated in fashioning these internal union proce-

dures. In order to pass constitutional muster, the procedure must, of course, protect the objecting employee's First Amendment right to refrain from financing activities unrelated to collective bargaining. In *Abood*, the Court emphasized the necessity of "preventing compulsory subsidization of ideological activity by employees who object thereto," 431 U.S. at 237. In his concurring opinion, Justice Stevens suggested that this included the right of objectors not to have their fees "used, even temporarily, to finance [non-chargeable] activities." *Id.* at 244.

At the same time, the Court repeatedly has made clear that the exclusive representative also has a legitimate and important interest at stake: the right to collect and expend objecting employees' fees for activities that *are* related to collective bargaining. In recognition of that interest, the Court has cautioned against overbroad remedies that "encroach[] on the legitimate activities or necessary functions of the union," *International Association of Machinists v. Street*, 367 U.S. 740, 774 (1961), and has approved only those remedies protective of objectors' rights that are carefully tailored "lest the important functions of labor organizations . . . be unduly impaired." *Allen, supra*, 373 U.S. at 120. As the Court put it in *Abood*:

> [T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.

431 U.S. at 237.

The Court also has expressed the hope that these internal union procedures would provide for the expeditious resolution of the claims of objecting fee payers, with the result that "prolonged and expensive litigation might . . . be averted." *Allen, supra*, 373 U.S. at 123.

B. *Ellis v. Railway Clerks*

Pursuant to this encouragement from the Court, NEA and other unions adopted internal procedures, but it was not until *Ellis v. Railway Clerks*, 52 U.S.L.W. 4499 (April 25, 1984), that the Court offered any specific guidance as to the type of procedure that would pass constitutional muster. Embracing the position taken by Justice Stevens in his concurring opinion in *Abood*, the *Ellis* court indicated for the first time that a "pure rebate approach" (*i.e.*, the union's "exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place") is not a constitutionally acceptable approach.[2] As the Court explained, the pure rebate approach, even with interest added to the amount ultimately refunded, is impermissible because it gives the union "an involuntary loan for purposes to which the employee objects". *Id.* at 4501. The Court then identified two alternative procedures that would be acceptable:

> [T]here are readily available alternatives [to a pure rebate approach], such as *advance reduction of dues and/or interest-bearing escrow accounts*, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily.

Id. (emphasis added).

In the instant case, the Court is called upon to develop the law regarding one of the "acceptable alternatives" identified in *Ellis*. Specifically, the issue is whether petitioners' 100% escrow procedure—pursuant to which the objector's entire agency shop fee is kept in an escrow account until he or she has exhausted all avenues available to challenge the amount charged—is constitutional. Inasmuch as this arrangement eliminates *any* possibility

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[2] Prior to *Ellis*, there was "language in this Court's cases to support the validity of a [pure] rebate program." *Id.* at 4501.

that the union will be able "to commit dissenters' funds to improper uses even temporarily," *Ellis, supra*, 52 U.S.L.W. at 4501, the Court at the very least must have intended to sanction a 100% escrow procedure when it stated in *Ellis* that interest-bearing escrow accounts are an "acceptable alternative." To the extent that the lower court concluded otherwise, its holding is squarely at odds with *Ellis* and must be reversed.[3]

But it will not undo the mischief caused by the lower court's decision for the Court simply to reaffirm what already is evident from the plain language of *Ellis*. The lower court's decision implicates a subsidiary question that was not directly addressed in *Ellis*: does the Constitution *require* a 100% escrow procedure, or can a procedure pass constitutional muster if it provides for an amount that is less than the objector's entire fee to be placed in escrow, and if this amount is determined, in the first instance, other than by a court or governmental agency? Although the lower court indicates that the answer to this latter question is no, its analysis is flawed. We will in the remainder of this brief demonstrate that a less than 100% escrow procedure, such as that used by NEA, is constitutionally permissible and, indeed, comes far closer to accommodating the interests identified by the Supreme Court in agency shop cases than does a 100% escrow procedure.

Before turning to the specifics of the NEA procedure, it is important to point out that, although *Ellis* establishes that a 100% escrow procedure is constitutionally *sufficient*, there is nothing in *Ellis* itself to suggest that such a procedure is constitutionally *necessary*. Indeed, the decision suggests precisely the contrary. Viewed in

[3] The lower court also found petitioners' procedure wanting in that the terms of the escrow are "left entirely up to the union" and "[t]he union might decide . . . to forego a high interest rate in order to punish dissenters. . . ." Slip op. at 14-15. As petitioners point out in their brief, however, this objection does not implicate any constitutional issue.

terms of the constitutional interest at stake in *Ellis*, the principal distinction between a 100% escrow procedure and a less than 100% escrow procedure is that the latter, unlike the former, does not *totally* eliminate the possibility that the union will be able "to commit dissenters' funds to improper uses even temporarily." *Ellis, supra*, 52 U.S.L.W. at 4501. But the other "acceptable alternative" explicitly approved by the court—*i.e.*, an advance reduction procedure—makes it clear that the existence of this possibility is not sufficient in and of itself to render an escrow procedure constitutionally invalid. By definition, an advance reduction procedure requires that a determination of expenditures not chargeable to objectors be made before or during a union's fiscal year, *i.e.*, the determination is based on anticipated expenditures.[4] Given that absolute protection against temporary misuse is obtainable only after the fiscal year has ended and the union's accounts have been audited, the Court could not have sanctioned an advance reduction of the agency shop fee as an acceptable alternative if any possibility of a discrepancy between anticipated and actual expenditures were sufficient to trigger the involuntary loan rationale.[5] Put another way, recognition of an advance reduction procedure as a constitutionally acceptable alternative necessarily forecloses the argument that objecting fee payers enjoy a right to be

[4] This is true whether the determination is made by the union itself, by an arbitrator or by a court.

[5] Since *Ellis*, the Court has reaffirmed the constitutionality of an advance reduction procedure. In *White Cloud Education Association v. Board of Education*, 101 Mich. App. 309, 300 N.W.2d 551 (1980), *appeal dismissed sub nom. Jibson v. White Cloud Education Association*, 53 U.S.L.W. 3268 (Oct. 9, 1984), and *Kempner v. Local 2077, AFL-CIO*, 126 Mich. App. 452, 337 N.W.2d 354 (1983), *appeal dismissed*, 53 U.S.L.W. 3323 (Oct. 29, 1984), the Court dismissed constitutional challenges to advance reduction procedures where the union in good faith determined the amount of the advance reduction. Summary decisions by this Court are adjudications on the merits. *E.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975).

free even from the theoretical possibility that their funds will be used temporarily for nonchargeable purposes.

The foregoing conclusion is buttressed by the *Ellis* Court's observation that advance reduction and escrow accounts would place "only the slightest additional burden, if any, on the union." 52 U.S.L.W. at 4501. The Court hardly would have considered a 100% escrow—which effectively would deny unions the use of any agency shop fees collected from objecting employees for an extended period of time—a non-existent or only slight burden. Nor is it likely that the Court intended in the same sentence to establish two procedures with vastly different consequences for the parties involved. A far better reading of *Ellis* is that the Court approved two substantially equivalent alternatives, which differ only in whether the objectors' money anticipated to be expended for nonchargeable purposes is returned to them in advance for their own use, or held in escrow, with interest, pending a final determination of actual expenditures after the end of the union's fiscal year.

In short, the teaching of *Ellis* is this: a 100% escrow procedure is constitutionally sufficient, but it is not constitutionally necessary. An internal union procedure that provides for the escrowing of less than the full amount of the objector's fee can, if properly fashioned, likewise be an "acceptable alternative."

C. *The NEA Procedure*

In order to demonstrate how a procedure which involves escrowing less than 100% of the fee adequately can accommodate the interests identified by the Court in agency shop cases, we describe one such procedure here. This procedure, which is used by NEA and its affiliates in several states, including Illinois, operates as follows.[6]

[6] The procedure actually is adopted by the local affiliate and used to determine the refundable portion of the total agency shop fee

Promptly after the end of each fiscal year, a member of the National Academy of Arbitrators, who has experience in public sector labor relations, is selected by NEA to serve as the Agency Shop Impartial Umpire. The function of the Umpire is to determine the percentage of NEA's dues income that NEA expended during the just ended fiscal year for purposes related to collective bargaining.[7] In making this determination, the Umpire is to be guided by the decisions of this Court, as elaborated upon by the lower courts. And, of course, the Umpire has access to all of the financial and other records of NEA.

If an employee who is required to pay an agency shop fee for a particular fiscal year files a written notice with the exclusive representative objecting to the use of his or her fee for activities unrelated to collective bargaining, NEA promptly establishes an interest-bearing escrow account in his or her name.[8] The amount escrowed from

paid to it by objecting employees. This fee includes payment to the local affiliate and also payments to its state and national parent organizations. As explained *infra*, the procedure functions in essentially the same fashion at all three levels. For purposes of simplicity in discussion, we refer in text to the "NEA procedure," and focus on its operation at the NEA level.

[7] A similar procedure is followed by the NEA state affiliate to determine the chargeable portion of its expenditures from dues income for the fiscal year in question. Because analysis by an impartial third party of the actual expenditures of each of the thousands of local affiliates that have bargained agency shop provisions would entail excessive delay, expense and burden, these affiliates are presumed to have expended the same proportion of their dues income on "related" activities as was determined for the state affiliate. Objecting employees are adequately protected by this presumption since local affiliates—with only local responsibilities—invariably spend at least as much, and probably more, of their dues income for activities related to collective bargaining than do state affiliates.

[8] The objection notice may be phrased in general terms (*i.e.*, an objection to the expenditure of the fee for impermissible purposes) and need not identify specific expenditures.

each fee payment[9] is equal to the percentage that the Umpire determined to have been expended for "unrelated" activities during the preceding fiscal year, plus a 5% "cushion."[10] When the fiscal year ends, the impartial review procedure described previously is again followed in order to determine the percentage of NEA's dues income that, in fact, was expended during the year for purposes related to collective bargaining.[11] The objecting employee then receives a copy of the Umpire's report (explaining how the determination was made) and a check from his or her escrow account in an amount that is equal to the "refundable" portion of the fee paid during the prior fiscal year, plus accrued interest.[12] Any money remaining in the escrow account—which would be attributable to chargeable expenditures—is paid to NEA.[13] If a fee payer wishes to challenge the amount of a refund as inadequate through an available adminis-

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[9] The vast bulk of NEA's membership dues and agency shop fees is paid in periodic (*e.g.*, bi-weekly) installments through payroll deduction systems.

[10] Thus, for instance, if the Umpire determined that 11% of NEA's dues income was expended for "unrelated" activities during the 1984-85 fiscal year, 16% of the 1985-86 fee would be escrowed for each objecting employee and only 84% of the fee would be available for use by NEA.

[11] Objecting employees, who previously have been sent an explanation of the procedure, related explanatory materials and copies of the relevant budgets, are free to make written submissions directly to the Umpire.

[12] This check is to be mailed not later than three months after the end of the NEA fiscal year. This modest delay is necessary to enable NEA's independent auditors to complete their analysis and submit an audit to the Umpire. The entire amount of all fees for the next fiscal year which are collected from an objector before the Umpire's report has issued are placed in escrow pending completion of the report.

[13] If the "refundable" portion for a given fiscal year exceeds the amount in an objecting employee's escrow account, he or she is paid the excess amount, plus accrued interest, from NEA's treasury funds.

trative or judicial proceeding, the unrefunded portion of the fee is retained in his or her escrow account (rather than being paid to NEA) until all appeals have been completed.

The NEA procedure accommodates the two interests identified by this Court in *Abood* and *Ellis*. First, it protects the rights of objecting employees. Because the filing of an objection triggers the prompt escrowing of 5% more than the portion of the objector's fee that presumptively would be expended during that fiscal year for "unrelated" activities (*i.e.*, the portion that *was* so spent during the prior fiscal year), it is highly improbable that any of the objector's monies will be spent for such activities. Thus, the concerns of the First Amendment are vindicated.[14] At the same time, the NEA procedure provides the exclusive representative with access to a portion of objectors' fees that is appropriately keyed to the costs of chargeable activities at a time when that money is needed to pay those costs.[15] Moreover, if the proportion of dues income actually expended on activities related to collective bargaining were to exceed the projected propor-

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[14] If the final refund exceeds the amount escrowed, *see* n.13, *supra*, NEA will to the extent of the difference be subject to the concern over impermissible temporary use. But as the Court noted with regard to a slightly different point in *Allen*, "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required." 373 U.S. at 122. *See also Ellis*, 52 U.S.L.W. at 4505 n.15 (relying on *Allen* in rejecting claim that heightened standard of proof should apply where objectors' First Amendment interests are implicated).

[15] If the fees were not available, the exclusive representative would have less money with which to perform its collective-bargaining related activities, or alternatively, dues-paying members —by definition a majority of the bargaining unit—would have to pay more than their fair share to support such activities. This latter alternative in turn would diminish the expressive rights of the majority of employees, since their payments to the union would be depleted to cover the costs incurred in the representation of free riders. The Court has made clear that such a result is disfavored. *See Street, supra*, 367 U.S. at 773; *Allen, supra*, 373 U.S. at 122.

tion (*i.e.*, the proportion expended during the prior fiscal year), the escrow arrangement would make it unnecessary for NEA to engage in a costly and time-consuming effort to recoup from objecting fee payers the additional amount to which it would be entitled.

The NEA procedure is, in addition, the type of "simple procedure" that may avoid "prolonged and expensive litigation." *Allen, supra*, 373 U.S. at 123. By assigning an experienced arbitrator the task of identifying in the first instance those activities of the exclusive representative that are related to collective bargaining, the procedure provides for an expedited, inexpensive and impartial determination without burdening the courts. If an objecting employee decides to appeal from the Umpire's determination, the reviewing court or agency will have before it a reasoned judgment based on the record of actual expenditures, which may be accorded "great weight," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974), *quoted in Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 743-44 n.22 (1981).[16]

The court below presumably would disapprove this aspect of the NEA procedure because of its belief that an arbitrator who is selected and compensated by the exclusive representative cannot possibly be impartial.[17] This conclusion simply is wrong. As a general matter, arbitrators—and especially individuals of the stature in-

[16] A court might elect to refrain from adjudicating a challenge to the portion of the fee being escrowed until after the employee has exhausted his or her remedies under the NEA procedure. *Cf. Clayton v. Automobile Workers*, 451 U.S. 679, 689 (1981).

[17] Because the Seventh Circuit seemingly believed that petitioners' procedure somehow foreclosed judicial review (slip op. at 10-11), it is not certain that the lower court would have rejected the NEA procedure, which expressly contemplates the right to such review. Nonetheless, the court's challenge to the impartiality of the arbitral process itself applies equally to the NEA procedure. Accordingly, we demonstrate the shortcomings of that challenge.

volved here[18]—presumptively can be expected to render impartial decisions. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982). To be sure, under the NEA procedure, the union—out of necessity—selects and compensates the arbitrator, but the Court never has suggested that a decisionmaker may be disqualified as impermissibly biased because of the possibility that he might seek to curry favor with one side or the other through his decision. Indeed, were this sufficient to establish unconstitutional bias, all adjudicators would have to be granted life tenure. *Cf. Dugan v. Ohio*, 277 U.S. 61 (1928); *Hortonville School District v. Hortonville Education Association*, 426 U.S. 482 (1976).

The court of appeals' reliance on *McDonald v. City of West Branch*, 52 U.S.L.W. 4457 (April 18, 1984), similarly is misplaced. In *McDonald*, the Court declined to give preclusive effect to labor arbitration awards in civil rights actions brought pursuant to 42 U.S.C. § 1983. But the conclusion that arbitrators may not *finally* de-

[18] The person who has been selected to serve as the NEA Umpire is Arvid Anderson. Mr. Anderson is a nationally recognized labor-management arbitrator who, since 1967, has been Chairman of the New York City Office of Collective Bargaining. Prior to assuming that position, he was a Commissioner and Executive Secretary of the Wisconsin Employment Relations Commission. Mr. Anderson is both an attorney and an economist. NEA's state affiliates have selected individuals of comparable stature to serve as their umpires. For example, the NEA affiliate in Illinois—the Illinois Education Association—also uses Mr. Anderson. And the Umpire for the New Jersey Education Association, which is the NEA affiliate in that state, is Eric Schmertz. Mr. Schmertz, who has been a labor-management arbitrator for more than 25 years, is Dean of the Hofstra University School of Law. He has served as a member of both the New York City Office of Collective Bargaining and the New York State Board of Mediation.

In selecting umpires, NEA and its affiliates limit themselves to members of the National Academy of Arbitrators. These men and women have a professional interest in their reputation for impartiality, and hardly would be willing to compromise that reputation for a particular assignment.

termine issues of constitutional magnitude surely does not mean that it is impermissible for arbitrators to pass upon matters affecting constitutional rights. To the contrary, the plain import of *McDonald* is that arbitrators may adjudicate such matters, but the party adversely affected may not be estopped from challenging arbitral determinations in federal court. *See* 52 U.S.L.W. at 4460 n.13.

Moreover, the fact that an objector's challenge is couched in First Amendment terms should not be permitted to obscure the essential nature of the dispute. The ability to determine what percentage of a union's budget is chargeable does not require familiarity with constitutional doctrine, but rather an understanding of collective bargaining and the purpose of various union activities. This understanding is much more likely to be found among arbitrators, who regularly interpret collective bargaining agreements, than among school boards,[19] other governmental officers, or federal courts.

In sum, the Constitution does not require that an exclusive representative be denied the use of all fees from objecting employees pending a judicial or state agency determination of the amount to which it is entitled. A procedure such as that used by NEA, pursuant to which an impartial arbitrator determines the portion of the

[19] There are numerous problems inherent in the lower court's suggestion that the line between chargeable and nonchargeable expenditures be determined in an "administrative hearing before the Board of Education . . ." (slip op. at 13). In light of the adversarial nature of the collective bargaining process, it would be manifestly inappropriate for the union to reveal to the school board in advance the precise manner in which it intends to allocate its resources. Further, a school board might well not be neutral in making this determination, inasmuch as a restrictive approach *vis-a-vis* chargeable expenditures would adversely impact the resources available to the union. And, finally, the additional administrative burden that would be imposed on the school board could cause it to resist the inclusion of an agency shop provision in the collective bargaining agreement.

objector's fee that is to be placed in escrow, provides a far more appropriate accommodation of the interests identified by the Court in agency shop cases.[20]

CONCLUSION

For the above-stated reasons, the Court should reverse the judgment below, and hold that the 100% escrow procedure used by petitioners is constitutionally sufficient, but not constitutionally necessary.

Respectfully submitted,

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[20] Several lower courts have upheld the constitutionality of the NEA procedure. *See, e.g., Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 53 U.S.L.W. 3599 (Feb. 19, 1985); *Dolan v. Rockford School District*, No. 84-20209 (N.D. Ill., Feb. 28, 1985); *Board of Education of Boonton v. Kramer*, —— A.2d ——, 119 LRRM 3354 (N.J. S.Ct., June 25, 1985). *See also Tierney v. City of Toledo*, 116 LRRM 3475 (N.D. Oh. 1984) (upholding identical procedure implemented by another union).

NO. 84-1503

In The

Supreme Court of the United States

October Term, 1985

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO; ROBERT M. HEALEY; JACQUELINE B. VAUGHN; ROCHELLE D. HART; THOMAS H. REECE; and GLENDIS HAMBRICK, individually and as Officers of the Chicago Teachers Union,

Petitioners,

v.

ANNIE LEE HUDSON; K. CELESTE CAMPBELL; ESTHERLENE HOLMES; EDNA ROSE McCOY; DR. DEBRA ANN PETITAN; WALTER A. SHERRILL; and BEVERLY F. UNDERWOOD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF WILLIAM CUMERO IN SUPPORT OF RESPONDENTS, ANNIE LEE HUDSON, ET AL.

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INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of William Cumero pursuant to Supreme Court Rule 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the clerk of this Court.

William Cumero is a public school teacher in California who is currently litigating before the California Supreme Court, challenging the use of compelled agency shop fees for political and ideological purposes. His litigation is based upon this Court's decisions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, — U.S. —, 104 S. Ct. 1883 (1984), which involve substantive protections directly implicated by the Seventh Circuit's opinion. As such, Mr. Cumero has a strong interest in the outcome of this litigation. Due to his posture as a litigant in a related case, he also brings experience and a knowledge of the issues enabling him to address the importance of this case and its potential impact on agency fee decisional law.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 743 F.2d 1187 (1984).

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STATEMENT OF THE CASE

Amicus adopts respondents' statement of the case.

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SUMMARY OF ARGUMENT

This Court has recognized that compelled agency shop fees implicate the First Amendment freedoms of speech and association. The impact of the agency shop on these liberty interests, however, has been constitutionally justified by the governmental interest in labor peace and stability. But this strong governmental interest is meant only to prevent "free riders" from receiving the benefits of negotiation and administration of collective bargaining agreements without sharing in their costs. Compelled agency fees to support expenses unrelated to these teachers' association activities is an unconstitutional infringement on the First Amendment.

The opinion of the Court of Appeals recognizes all of these tenets and, far from creating a new liberty interest, merely relies on a due process rationale to protect an individual's First Amendment rights from a fee deduction for activities unrelated to collective bargaining. It provides procedural protection for the substantive rights already delineated by this Court.

Moreover, the Court of Appeals' opinion is a step toward greater clarity in the agency shop law developed by this Court. By formulating a due process analysis based upon bargaining agent expenses related to collective bargaining contrasted to unrelated expenses, the Seventh Circuit has avoided the definitional problems of the "political" and "ideological" inquiry. This provides more protection for First Amendment freedoms and concomitant adherence to the "free rider" rationale upon which the agency shop is based.

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ARGUMENT

I

THE COURT OF APPEALS CORRECTLY IDENTIFIED A DUE PROCESS LIBERTY INTEREST FOR THE PROTECTION OF ASSOCIATIONAL FREEDOMS

This Court has long recognized the fundamental liberties of speech and assembly reposed in the individual by the First Amendment. *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937); *Palko v. Connecticut,* 302 U.S. 319, 324 (1937). Moreover, the close nexus between these two basic freedoms, derived from the important role an informed citizenry plays in our democratic system, led this Court to conclude that the ability to associate for the advancing of ideas and the airing of grievances was a fundamental liberty, inseparably tied to the First Amendment. *National Association for the Advancement of Colored People v. Alabama (NAACP),* 357 U.S. 449, 460 (1958); *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960). As such, this right of association is deserving of due process protection. As Justice Harlan stated in *NAACP:* "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment . . . ." 357 U.S. at 460.

The opinion of the court below is in complete harmony with these basic tenets. In recognizing the associational freedom implicated by compelled agency fees and in relying on a due process rationale to protect this interest, the decision does not create a new founded right; it steadfastly protects the liberty recognized by this Court to be at the core of democratic government.

A. Compelled Agency Shop Fees Implicate an Employee's Freedom to Associate for the Advancement of Ideas

The liberty interest in association is an expansive right and thus capable of taking many forms: it is directly involved in political associations (*Adler v. Board of Education,* 342 U.S. 485 (1952)), restrictions on entry into the bar (*Law Students Civil Rights Research Council, Inc. v. Wadmond,* 401 U.S. 154 (1971)), and campaign financing (*Buckley v. Valeo,* 424 U.S. 1 (1976)), to name a few of the many opinions addressing its numerous manifestations.

The Court in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), recognized that freedom of association is also implicated by the agency shop. The core of the constitutional problem concerns forcing an individual to support an employee association which may espouse positions contrary to the employee's ideals and beliefs. While protecting affiliations of like-minded persons who desire to pool talent and resources for expressive conduct is a beneficial aspect of this Court's First Amendment jurisprudence, compelled association is only destructive of the First Amendment liberties.

> "The fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State." *Abood,* 431 U.S. at 234-35 (footnote omitted; citations omitted).

More recently, this Court in *Ellis* echoed the language in *Abood* by noting that "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights." *Id.* at 1896.

Yet associational freedoms are not absolute. Infringements can be justified by compelling state interests which are unrelated to the suppression of expressive conduct. *Roberts v. United States Jaycees,* — U.S. —, 104 S. Ct. 3244 (1984). Federal and state laws which allow agency shop formation are based upon the hope of maintaining labor peace by having all employees finance the exclusive representative in collective bargaining, thus preventing labor unrest spawned by "free riders" — nonmembers benefiting from representation without contributing to the bargaining agent's cost. This interest in labor peace has been held as compelling; hence the constitutional impingements recognized in *Abood* and *Ellis* were justified by this strong governmental interest. *Ellis,* 104 S. Ct. at 1896; *Abood,* 431 U.S. at 222.

The opinion below is completely consistent with these precedents. It merely moves one step beyond the substantive observations of *Abood* and *Ellis* and delineates well reasoned procedural protection.

B. The Court of Appeals' Decision, Far from Creating an Unprecedented New Liberty Interest, Merely Provides Procedural Protection for the Fundamental Right of Association

The substantive holdings of *Abood* and *Ellis,* which countenanced the associational impediments in order to effectuate compelling government interests, were based upon the "free rider" rationale. This rationale, however,

is not involved with bargaining agent expenses unrelated to contract negotiation and administration. Fees cannot be removed from dissenting employees' paychecks to finance such activities without violating the First Amendment.[1] *Abood,* 431 U.S. at 235-36 (employing "political or ideological" language); *Ellis,* 104 S. Ct. at 1892 (referring to expenses "necessarily or reasonably incurred" in bargaining duties). Consequently the freedom of association and speech will take precedence over the governmental interest in labor peace when the "free rider" rationale is not applicable.

This dichotomy—governmental interests in labor relations versus protected associational and speech rights—is the core of *Abood* and *Ellis.* And this is the distinction to which the opinion below is directed. As Judge Posner states:

> "True, freedom of association . . . is no more absolute than the other liberties [protected by] the due process clause . . . . But the fact that it enjoys the procedural protections capsulized in the term 'due process' means that the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably

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[1] *See International Association of Machinists v. Street,* 367 U.S. 740, 768 (1961). After acknowledging that Congress' purpose in allowing the agency fee was to deal with the free rider, the Court noted that the use of the fee

> "to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified."

assure that the deprivation will go no further than is necessary to prevent the individual from taking a free ride . . . ." 743 F.2d at 1193.

The court below recognizes that the agency shop fee was premised on the "free rider" rationale. The nonmember benefits from negotiation and administration of collective bargaining contracts—not from employee association activity not related to these functions. Hence, the appellate court holds, based on *Abood,* that if dues are collected for the latter activities, First Amendment freedoms are implicated, and they are no longer outweighed by a governmental interest because the "free rider" justification is inapplicable.[2] Thus, the opinion develops a line of reasoning based upon due process—the ultimate object to distinguish a constitutional infringement on associational rights to prevent labor unrest from an exaction of fees for activities not related to collective bargaining.

The opinion below is thus completely consistent with earlier case law; it recognizes the constitutionality of the agency shop and the justified impact on First Amendment rights. Its sole contribution to the agency fee decisional law is in the context of procedural due process, assuring that payments will in fact be used to finance a bargaining agent's collective bargaining activity and will go no further in depriving an employee of First Amendment liberties. As Justice Harlan stated in *NAACP,* 357 U.S. at 460, the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth

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[2] See Footnote No. 1, *supra.*

Amendment . . . ." The Seventh Circuit's opinion acts to provide this process.[3]

II

A DUE PROCESS LIBERTY INTEREST TRANSCENDS THE "POLITICAL" OR "IDEOLOGICAL" INQUIRY, THUS PROVIDING BETTER PROTECTION OF THE FIRST AMENDMENT AND CONTINUING ADHERENCE TO THE "FREE RIDER" RATIONALE

The dichotomy between compelled agency fees to support collective bargaining and political activities was initially delineated in *International Association of Machinists v. Street,* 367 U.S. 740, a case based upon statutory interpretation. This dichotomy was elevated to constitutional status in *Abood,* 431 U.S. 209. These cases distinguished proper fee expenditures for collective bargaining from political uses of the agency fees unrelated to the bargaining representative's responsibilities.

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[3] This Court's summary dismissals of *Jibson v. White Cloud Education Association,* — U.S. —, 105 S. Ct. 236 (1984), and *Kempner v. Dearborn, Local 2077,* — U.S. —, 105 S. Ct. 316 (1984), are not determinative here. A summary disposition, while interpreted as a vote by this Court on the merits *(Hicks v. Miranda,* 422 U.S. 332, 343-44 (1975); *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247 (1959)), has limited precedential value. It governs only on the precise issues and particular facts involved in the case which was summarily disposed. *Mandel v. Bradley,* 432 U.S. 173, 176 (1977); *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 180-81 (1979). *Jibson* and *Kempner* involved employees contending they could not constitutionally be required to pay the agency fee *prior* to an adjudication to determine its precise use and amount. The Court of Appeals' opinion below, however, never mandates a preseizure hearing. Indeed, it notes that under the current procedure an employee has 30 days *after* deduction to file an objection. Judge Posner does not criticize this temporal aspect of the process; he only condemns the employee association's control of the procedure and orders removal of any structural bias. *Jibson* and *Kempner* are thus factually distinct.

Yet the *Street* and *Abood* decisions, while thoroughly recognizing the liberty implications of compelled agency fees, did not attempt to draw a clear line between proper collective bargaining expenditures and taboo political activities. Indeed, *Abood* recognized that such line drawing presented "difficult problems" and would be even more difficult to define in the public sector. 431 U.S. at 236.

This dichotomy has continued to prove nebulous. One commentator noted that "[t]he difficulty with the test suggested by *Abood* and *Street* is that there is no clear distinction as a practical matter between collective bargaining and political activity. In many instances, union political activity is integrally related to the pursuit of union representational goals." D. B. Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds,* 14 U. Cal. D. L. Rev. 591, 601 (1981). Archibald Cox noted in his labor law text that this issue is "the elusive problem left unresolved by the Supreme Court of defining the kinds of 'political' expenses which cannot lawfully be taxed against an unconsenting employee." A. Cox, D. Bok, R. Gorman, *Labor Law* 1184 (1977).

In *Seay v. McDonnell Douglas Corporation,* 371 F. Supp. 754 (C.D. Cal. 1973), *rev'd on other grounds,* 533 F.2d 1126 (9th Cir. 1976), the court demonstrated this uncertainty by drawing the line to prohibit the use of union shop funds only for *partisan* political activities. 371 F. Supp. at 761 n.7. Expenses for other political purposes were held proper.

In the decision below, however, the court deviates from this political/collective bargaining intersection. In recognizing the due process protection of the associational liberty interest, Judge Posner notes:

> "[T]he procedure must make reasonably sure that . . . employees' wages will not be used to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological. . . . [T]he agency fee [must] not [be] used for any unrelated activities." 743 F.2d at 1194 (emphasis in original).

Thus, the Court of Appeals' decision transcends the political/ideological designations that have puzzled lower courts and commentators alike. This conclusion is a logical extension of *Ellis* and *Abood.* Both of these opinions recognized that compelled agency fees impinged on associational freedoms, but such impingement was constitutionally justified by the compelling state interest in labor peace. Yet the free rider rationale only applies to nonmembers receiving the benefits of contract negotiation and administration. *International Association of Machinists v. Street,* 367 U.S. at 767-68. The justification is not applicable to employee association expenses unrelated to collective bargaining—not just political or ideological expenses but all unrelated financing. Hence, compelling an individual to associate for any reason, other than to pay for the benefits of collective bargaining representation, violates the freedom to associate and does so without a compelling government interest. This is the line the opinion below attempts to draw. And by avoiding the political, ideological wording, it strengthens the First Amendment freedoms while remaining true to the free rider justification.

A. The Appellate Court Decision Better Effectuates an Employee's First Amendment Freedoms

In addressing the freedom to associate in *NAACP*, 357 U.S. at 460, Justice Harlan noted that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ." Thus, the freedom to associate for a broad range of purposes is expressly recognized.

The opinion below, by transcending the political and ideological phraseology, is consistent with Justice Harlan's language. Associating only for political or ideological purposes is not the only protected freedom recognized in the *NAACP* case. One must not discount social, cultural, economic, or religious purposes; they are equally protected, but not encompassed within the *Abood* language. Consequently, the statement by Judge Posner seems more certain: "the procedure must make reasonably sure that . . . employees' wages will not be used to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological." 743 F.2d at 1194 (emphasis in original). Not only does this bypass the uncertainties and the hazy lines encompassed within political and ideological activity, but it also recognizes the liberty of association for many other purposes—not just political—unrelated to collective bargaining. It is wholly consistent and protective of Justice Harlan's declaration in *NAACP*.

The due process rationale adopted by Judge Posner is supported by *Ellis*. There this Court presented the following test to decide if expenses are related to collective bargaining and labor management relations:

> "[W]hen employees . . . object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." 104 S. Ct. at 1892.

Moreover, in discussing the expenses there at issue the Court did not concern itself with the potential political or ideological ramifications of the costs.

The test developed by *Ellis* supports the holding below that expenses must be germane to collective bargaining, and *Ellis* explains how a pertinent expense is to be identified. The next step is to cast aside any inquiry into political/ideological expenses, and center the analysis entirely on fees deducted to subsidize an employee association's collective bargaining responsibilities; the use of the compelled dues for any unrelated activities is prohibited and impinges on speech and associational freedoms.

B. The Reasoning of the Court of Appeals Promotes the Purpose of the Agency Shop by Preventing Nonmembers from Receiving Representation Without Payment of the Fees

Compelled agency shop fees are designed to ensure labor peace by weeding out the free riders—those who "refuse to contribute to the union while obtaining benefits of

union representation that necessarily accrue to all employees." *Abood,* 431 U.S. at 222. *Ellis* was most explicit in stating this Court's belief "that Congress' essential justification for authorizing the union shop was the desire to eliminate free riders." 104 S. Ct. at 1892.

The Court of Appeals' decision remains true to this justification. By distinguishing expenses related to collective bargaining from unrelated costs, the opinion not only protects First Amendment freedoms, but it also allows collection of the fee from employees who receive the benefit of union representation in contract negotiation and administration. Hence, an individual is not unfairly benefited by the employee association's representation free of charge.

Admittedly, perhaps an employee could receive a "free ride" from a bargaining agent's undertakings unrelated to negotiation and administration. But such a contention ignores this Court's language in *Street,* 367 U.S. at 768:

> "[The] use [of the agency fee] to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration . . . . In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified."

Moreover, such an argument is also inconsistent with the *Ellis* opinion. There, Justice White noted that "[o]nly a union that is certified as the exclusive bargaining agent is authorized to negotiate a contract . . . . Until such a contract is executed, no dues or fees may be collected" from nonmembers. 104 S. Ct. at 1892. The test subsequently developed by the Court was intended to aid in the

identification of union expenses related to its exclusive bargaining role. This quoted language and the accompanying test indicated that the free rider justification for the creation of the union shop only applies to nonmembers benefiting from contract related duties. There is no hitchhiking on activities unrelated to collective bargaining undertakings.

Thus, the free rider justification is addressed to the administrative and negotiating duties of the employee association. *Street, Abood,* and *Ellis* all concentrate on these responsibilities when discussing the reasons for adopting the agency shop. The test developed by the Seventh Circuit is fully consistent with this purpose.

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CONCLUSION

The liberties of speech and association reposed in the individual by the First Amendment have long been recognized by this Court not only as fundamental freedoms, but also as rights crucial to the functioning of a democracy. As such, these freedoms are entitled to a due process liberty protection before they are invaded by governmental action. The opinion of the Court of Appeals is consistent with these premises. It recognizes that the agency shop is a justifiable impingement on the freedom of association, but only insofar as the dues are used for activities related to collective bargaining. Any other fee exaction violates the freedoms this Court has so long protected. Consequently, by developing a due process rationale and by dispensing with the political and ideological labels, the opinion

below favors fundamental liberties, and merely provides procedural protection for substantive rights already recognized by this Court.

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Respectfully submitted,

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